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CURRENT TOPICS.

A decision has recently been had in the English Court of Appeal, in Latter v. Braddell. The ruling of the Common Pleas Division of the High Court in this case, called forth our comments in the issue of February 11 (12 Cent. L. J. 121). We there expressed our dissent from the view of the law of duress upon which that decision was based, and it is with some gratification that we find that the opinion of the Court of Appeal accords with our own. A full report of the case will be found in another column.

An interesting decision on the subject of trademarks was rendered on the 21st inst., by Judge Treat in the Federal Circuit Court for this district, in the case of the Singer Manufacturing Co. v. Stanage. The plaintiff had had by means of its patents, a monopoly of the manufacture and sale of certain sewing machines known to the public as the "Singer." When these patents expired everyone had an equal right to make and vend such machines. The defendant, after the expiration of the patents which had guarded the plaintiff's monopoly, engaged in the manufacture and sale of the machines, calling them the "Stewart-Singer" machines. This the plaintiffs claimed to be an infringement of their rights to the name "Singer," as a trade-mark. If the patentees or their successors could assert successfully, after the expiration of the patents, the exclusive right to the name "Singer," as a trade-mark, the consequence would be to practically extend the monopoly of the patent indefinitely. It was contended that, although the defendant had an indubitable right to manufacture and sell the "Singer" machines—that is machines known as such in the market—so far as their mechanism was concerned, they had no right to advertise or sell them under the name "Singer," wtth or without a prefix. In other words, that the plaintiff had, during the life of the patent, acquired a monopoly in the *name* under which it manufactured and sold its patented article, by which it could exclude, after the expiration of the patent, all others from making or vending the machines under the only name by which they were known to the public. The court dismissed the bill, holding, *inter alia*, 1. That when a patented article is known in the market by any specific designation, whether of the name of the patentee or otherwise, every person, at the expiration of the patent, has a right to manufacture and vend the same under the designation by which it is known to the public. 2. That the original patentee, or his successors, have no right to the exclusive use of said designation as a trade-mark. Their rights were under the patent and expired with it. 3. That, inasmuch the word "Singer" indicates a machine of peculiar mechanism, and as every one has the right to make such a machine, the word "Singer" attached to such a machine is common property. See Singer Manufacturing Co. v. Wilson, 3 App. Cas. 376; and same v. Trainer, 101 U. S. 51.

In the English Court of Appeals, it was recently held that an action lies for maliciously procuring a breach of a contract to give exclusive personal service for a time certain, provided damage accrues; and that to sustain such an action, it is not necessary that the employer and the employed should stand strictly in the relation of master and servant. Bowen v. Hall, 29 W. R. 367, The plaintiff, Bowen, was a manufacturer of fire brick, and employed one Pearson to undertake, for certain scheduled prices, to find the whole labor for the manufactory, to furnish certain material and to do certain other things; and Pearson further agreed not to engage himself to any one else for a term of five years. It appeared that Pearson was accustomed to visit his wife, who was employed under a similar contract with the defendant, Hall, at Hall's works, and that he occasionally assisted her in her work during those visits, and also after business hours. And there was evidence that the defendant, Fletcher, who was Hall's foreman, had suggested to Pearson that he should enter into a contract in his wife's name with Hall, who was aware of his visits, inasmuch as he received several letters of remonstrance from the plaintiff upon the subject. See Lumley v. Gye, 1 W. R. 432; 2 E. & B. 216; Vicars v. Wilcocks, 2 Sm. S. C. 553; Ashby v. White, 1 Sm. S. C. 264.

DELEGATION OF DISCRETIONARY POWERS BY A TRUSTEE.

I.

A trustee can not delegate to a co-trustee, or a stranger, any power to which is attached the exercise of discretion.

It is an elementary principle of the law relating to trusts, that where the administration of the trust is vested in several trustees, they all form but one collective trustee, and, therefore, must execute the duties of the office in their joint capacity. It is true, that it is not unusual to hear one of several trustees called the acting trustee, but the court knows no such distinction; all who accept the trust are acting trustees, and if any one refuse to join, it is not competent for the others to proceed, but the administration of the estate in that case must devolve upon the court.[1]

And since the law is so imperative in forcing co-trustees to join in every act, in order to render it valid, it would seem necessary, to explain this, to assume that every trustee is always supposed to be selected by the settler for some personal reason of confidence or trust. The question then has often arisen, whether a trustee can delegate any of his powers to act, either to a co-trustee or a stranger. The maxim of the law on this subject is, *Delegatus non potest delegare*, and consequently, it would seem that a trustee can not delegate any of his powers to any one else. It has, however, been frequently asserted, that this maxim, like all such very general propositions of law, has been much abused, and is subject to exceptions; and one of these exceptions is, that a trustee can delegate some of his powers to act to his attorney. It has been said by a very eminent American lawyer,[2] in one of his opinions, that the general position that a grantee or devisee of an estate in fee simple in trust, and with a power of sale, can not both sell and convey by attorney, is not to be found stated in any book or by any writer of authority, and that the general principle should be the other way, inasmuch as such a trustee has the whole legal estate in him, and is competent by the common law both to sell and convey his estate by attorney, which are legal acts. There is no doubt of the correctness of these propositions of law, nor of their soundness; but the existence of such an exception to the maxim of *delegatus non potest delegare*, suggests the inquiry of, how far can one, possessed of such delegated powers as a trustee, delegate them in turn to another.

It is undoubtedly true, that a merely ministerial duty or office may be delegated by a trustee, when it requires absolutely no greater degree of discretion than what is attendant upon the execution of any purely ministerial act; but it is more doubtful whether any power, involving the exercise of discretion, can be delegated by one trustee to a co-trustee or stranger. This question has frequently been agitated, and we think the rule deducible from the cases is, that no power, to which is attached the exercise of discretion, can be delegated by a trustee either to a co-trustee, or to a stranger.

In Combe's Case,[3] "it was agreed by all the judges in their several arguments, that * * * * a copy-holder may surrender his estate in court * * * * * by attorney, * * * * * and it will more clearly appear, if the reason of such things, which a man may do by attorney, be well considered. And, therefore, if a man hath a bare authority, accompanied with a trust, as executors have to sell lands, they can not sell by attorney; but if a man hath an absolute authority as owner of the land, there he may do it by attorney, as *cestui que use* may * * * * * before the statute of 27 Henry 8, * * * and, therefore, if A be a tenant for life, with remainder in tail [power coupled with an interest], and A hath power to make leases for twenty-one years, rendering rent, etc., he can not make a lease by letter of attor-

[1] Lewin on Trusts, p. 298; Hill on Trustees, p. 305, and see authorities there cited. See, also, the cases of Crewe v. Dicken, 4 Ves. 98 (1798), followed by Nicholson v. Wordsworth, 2 Levanst. 370 (1818), holding that where one of two trustees had once acted, but had afterwards released and conveyed all his interest to the other, yet both would have to join in the receipt of the purchase-money to discharge the purchaser's liability to see to its application; see also Sugden on Vendors and Purchasers, Vol. 3, p. 173; also cases in 1 Amer. Lead. Cases (1871), in note to Hunt v. Rousmanier, p. 713; also Vandever's Appeal, 8 W. & S. (Pa.) 405; Sinclair v. Jackson, 8 Cow. 544; Hood v. Law, 3 Blatch. C. C. 471; Chapin v. First University Society, 8 Gray (Mass.) 583; Holcomb v. Idem, 3 Stock (N. J.) 285.

[2] Mr. Horace Binney in his opinion in the Bingham Estate.

[3] 9 Reports, 75 b. (1812).

ney by force of his power, because he hath but a particular power, which is personal to him; and so it was resolved in the case of Lady Gresham at the Assizes in Suffolk in Lent, 24 Eliz., by Wray and Anderson, Chief Justices of Assize there." In Wilson v. Denison,[4] [naked power], one of the questions as to the legality of the presentation to a benefice, was whether the trustee could vote by proxy. Lord Chancellor Eldon said: "There is a discretion to be used by the trustees in electing a proper person to officiate as minister; and it is a personal trust in them, and no instance can be produced where, in a personal trust, a proxy is allowed. If the election had been regular, a proxy by way of letter of attorney, had been good, to sign the presentation; but as to the election, the trustees could not delegate their power. I think the proxy, being made to vote for a particular person, makes it worse, for it is clear that the trustee determined his choice for private reasons at home, not at the public meeting on a general inquiry into the abilities and qualities of the candidates, and the arguments and reasons of the other trustees; and it is much easier to prevail on any person at home, on any private application, than at a general meeting, where the whole conduct of the candidate is discussed."

In Hawkins v. Kemp,[5] [power coupled with an interest] the settlor in a marriage settlement, being a tenant in tail, settled the same to himself for life and to the children of the marriage in strict settlement, with a proviso that it should be lawful for him, by deed or settlement in writing, attested by three witnesses, and to be enrolled with the consent in writing of certain trustees, to revoke the old, and declare new uses. The court held that a deed of revocation executed by him and all the trustees in person, except one, and the consent of that one being given by means of a general power of attorney being made by him to the settlor, by virtue of which the settlor executed the deed for and in the name of such trustee, is bad, though properly attested and enrolled. In this case it was contended that the power extended to the assent of the surviving trustee, but the court intimated so decided an opinion, against this view, that the argument was finally abandoned. In Heger v. Deaves,[6] [naked power] Chancellor Kent said: "The master being sick did not attend the sale, but deputed a competent agent, who attended and sold the land. The objections to the fairness and regularity of the sale are denied and completely removed, except the objection that the sale was not made by a master who was present. The statute says that all sales of mortgaged premises under decree shall be made by a master, and I do not think it the subject of a special deputation. * * * If he had been present, and had employed an auctioneer or crier, it would still have been his sale, and the parties would have had all the benefits of his superintendence and judgment. But to allow such a sale as this to stand, would open the door to very lax and dangerous practice." Again, in Tainter v. Clark,[7] [naked power] C, by his last will, gave to his wife the interest and income of $1,000 during her life. After making other bequests and devises, he devised and bequeathed the residue of his property, real and personal, to his daughter and her children, and to his grandson, in equal shares, subject to the rights and discretions heretofore given by the will to the executor. He then appointed T his sole executor, and authorized him to sell and convey such of his property as would, in T's judgment, best promote the interest of all concerned, to raise the $1,000, for the use of his wife and daughter, and to pay his debts. T declined to act as executor, and D was appointed to act as administrator with the will annexed. D, under his appointment as administrator, and by no other authority, sold and conveyed C's real estate, for the purpose of raising the money to pay C's debts and the legacies given by the will. It was held that the trust reposed in T was a personal one, and that D had no authority to sell the testator's real estate, and that the sale and conveyance were void as against the testator's heirs. Wilde, J., said: "All the authorities agree, that if a power is given, indicating personal confidence, it must be confined to the individual, or individuals, to whom it is given, and will not, except by ex-

[4] 1 Ambler, 86 (1749).
[5] 3 East, 410 (1803).
[6] 2 Johns. Ch. 154 (1816).
[7] 13 Metc. 226 (1847).

press words, pass to others than the trustees originally named, though they may, by legal transmission, sustain the same character; so it was decided in Cole v. Wade,[8] and in many other cases." And in Sinclair v. Jackson,[9] [power coupled with an interest] M C, who died, seized of the premises in fee, by will devised them to B M and C, his wife, and to E M as joint tenants in fee in trust, to receive the rents and profits and pay them to F B C during his life, and after X's death, to convey the premises to his lawful issue. After the death of the testatrix, the three trustees executed a power of attorney to F B C, *cestui que trust*, empowering him to grant leases for any term not exceeding twenty-one years, and to take the rents to his own use. Afterwards, two of the trustees (E M not joining) gave F B C another power, authorizing him to lease. He acted as attorney of the two trustees, and made leases which were declared void by the court. The question, whether trustees could act by attorney in executing leases, was not necessary to decide the case. The Chancellor said, in reference to that point:[10] "The better opinion is, that they, the trustees, might act by attorney, provided they restricted him to the conditions prescribed by the order, and left him the executory act alone of executing a lease for them in conformity with the order." The court held the leases to be void, because they were made out in the names of two trustees only. "It is a settled rule, that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is necessary to its due execution. * * * * They have no separate interests of their own on which the separate deed can operate, * * * * and unless specially authorized to act separately by the instrument creating the trust, they can make no disposition of the trust estate vested in them, otherwise than by their joint deed."[11] And the same principles were laid down in Hawley v. James.[12] [Power coupled with an interest.] The testator, there, devised real estate to his trustees, with power to sell. The real estate was in New York and in Illinois. The trustees filed a bill praying to have their duties and powers defined by the court; among other things, that, "as the testator was entitled to various parcels of real estate, situated in various counties in this State (New York), and to a large quantity of real estate in Illinois, it would be reasonable and necessary that the trustees have liberty to sell such real estate, through the instrumentality of an agent or attorney, and with the sanction of this court."—Per WALWORTH, Ch. "A trustee who has only a delegated discretionary power, can not give a general authority to another to execute the same, unless he is specially authorized so to do by the deed or will creating such power. A general authority to an agent to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands, can not therefore be given by the trustees. * * * * The better course in a case of this kind is, therefore, to entrust the agent with a discretionary power to contract, subject to the ratification of the trustees, upon his report of the facts, and that they should themselves execute the conveyance, when the terms of the sale have been complied with, and transmit it, properly acknowledged, to the agent to be delivered to the purchaser."

It has been more than once contended, that there is a distinction to be made between those cases, where a power, coupled with an interest, is given to the trustee, and those, where only a naked power is bestowed by the settlor; and it has been asserted that in the former case, the discretionary powers of the trustee, may be exercised by an attorney; and that this is not so, only when the power is naked, or is given on purely personal grounds, This distinction, however, can not be supported either by the English or American authorities.

In Bulteel v. Abinger,[13] [power coupled with an interest] A, by his will, gave his estate of Bagshot, for life, to his wife. His will contained a power for the tenant, for life, to sell the estate with the consent of the three trustees. In 1835 the estate was conveyed in fee to the trustees. A bid being made for the estate by the son of Lord Abinger, one of the trustees, the latter wrote to one of his cotrustees, "he (Lord Abinger's son) will

[8] 16 Ves. 27.
[9] 8 Cowen, 575 (1826).
[10] Sinclair v. Jackson, 8 Cow. 581.
[11] See Sinclair v. Jackson, 8 Cow. 583.
[12] 5 Paige, 687, (1835).
[13] 6 Jurist, 410 (1842).

have no assistance from me in the matter. Nor shall I take any interest directly or indirectly in it. Indeed, I think I ought not to give any opinion on it, and shall decline doing so." The two co-trustees of Lord Abinger subsequently contracted to sell the estate to the plaintiff, Mr. Bulteel, for a fixed sum. Lord Abinger's son then wrote to his father that he would have paid a higher price than that offered by the plaintiff. Lord Abinger refusing to confirm the contract for sale by his two co-trustees, an action for specific performance was brought by the plaintiff against all the trustees, on the ground, among others, that Lord Abinger had delegated his authority to his co-trustees, and that they therefore might act for all three. Sir James Wigram said: "If the other trustees had made a contract with Lord Abinger's son to sell the estate for £25,000, whilst the plaintiff was willing to give £26,000, and Lord Abinger, knowing that, had attempted to confirm the sale, equity would have compelled him to rescind the transaction as against his son, and he would, therefore, be equally bound to rescind it as against the plaintiff. * * * * Even with that protection (*i. e.*, the protection which competition would insure at an auction), his Lordship said he thought that Lord Abinger could not lawfully delegate to his co-trustees an authority to sell the estate to his son, without reserving to himself a veto upon the contract." In Budd v. Hiler,[14] [power coupled with an interest] Chief Justice Green said: "A trustee duly appointed, either under a power or by the court, and in whom the legal estate in the trust property has bas been vested, stands in the same situation and is invested with the same powers and privileges with reference to the trust estate, as if he had been originally appointed a trustee, with the single exception of confidential or discretionary powers conferred on the original trustee." Here it was held that a trustee appointed by the Orphan's Court in the place of one that had died, may maintain an action for money had and received against a person who has money in his hands which justly belongs to the trust estate, although the money was received before the appointment of the trustee. In Belote v. White,[15] [power coupled with an interest] the testator bequeathed certain real and personal estate to three trustees, to be held by them in trust for the use and benefit of his daughter B and her children, etc.; and the said trustees, or any two of them, or the survivor, were vested with power to sell and convey any part or all of the property for the use and benefit of said daughter and her children, to vest and revest the proceeds, and to manage the whole in any manner they might think promotive of the interest of the beneficiaries. And at the death of the daughter B, the whole of said property was to be equally divided between all of her living children, and the heirs of such as may have died. * * * In the division of the real estate of the testator, the tract of land in controversy fell to B and her children. A trustee was appointed by the decree of the Chancery Court, in place of those appointed by the will, who sold and conveyed the tract of land in 1847. Wright, J., said: "Though the trusts in this will for B and her children were imperative and well defined, and such as a court of chancery might execute, yet the power of sale conferred upon the trustees was, in our opinion, discretionary, and a thing entirely of personal trust and confidence in the three trustees, or any two of them, or the survivor, and could be executed by no one else. It could not be devolved upon others, either by deed or will, or other act of the trustees, or be executed by their heirs or personal representatives, because the will did not so provide. Nor could a court of chancery have forced the trustees to execute it, or execute it itself, by its clerk or master, or otherwise; nor could a trustee appointed by the court do so; but upon the death, or refusal to act, of the trustees, the power became extinct and gone. How could a court of chancery here substitute the master or another trustee for the three original trustees? It was not imperative that a sale should be made. The testator intended that Mrs. B and her children should have the benefit of the judgment of their trustees, or some two of them, or the survivor, as to the necessity and propriety of a sale. But how could Talbott's [the substituted trustee's] judgment be their judgment? We think, therefore, that the sale by him as against the plaintiff was unauthorized, and so void."[16] So in Saun-

[14] 3 Dutcher, 43 (1858).
[15] 2 Head. (Tenn.), 710 (1859).
[16] See, also, Hill on Trustees, Ed. 1846, §§ 472-3; 483-4; 495; Cole v. Wade, 16 Ves. 28; Coxe v. Day, 13

ders v. Weber,[17] [power coupled with an interest] there was an action for a perpetual injunction to restrain the execution of a writ of restitution issued upon a judgment in forcible entry and detainer entered in favor of the appellants, against Saunders, the husband of the respondent, for certain lots situated in the City of Sacramento. Plaintiff claimed the lots in question as her separate property, and derived title among conveyances, by virtue of a deed from B J B and H H, assignees and trustees of one Simmons, executed by one N, their attorney in fact. Said Rhodes, C. J.: "The deed of trust executed by Berger Simmons to Billings, Bolton and Halleck, as trustees, empowered them to sell and dispose of the lands mentioned in the deed, either at public or private sale, for such prices and on such terms and conditions, and either for cash or upon credit, as, in their judgment, may appear best or most for the interest of the parties concerned, and convert the same into money. The powers thus conferred are, to a material extent, discretionary. The trustees are required to sell the property and convert it into money; but in respect to the mode, terms and conditions of the sale, the execution of the powers requires the exercise of judgment and discretion on their part. The rule is as well settled as any one in equity jurisprudence, that a discretionary power can not be delegated to a stranger by assignment. The deed of trust does not authorize the trustees to delegate their powers." Sprague, J., concurred, and Hawley v. James,[18] Berger v. Duff [19]; Sugden on Powers; Alexander v. Alexander,[20] Story on Agency,[21] were cited with approval. And finally, in Hunt v. Douglass,[22] [naked power] A delivered a horse to B for B to use, with the power of sale. B soon changed the horse with C for another horse; and C agreed that he would pay to A $15 as the difference between them, and the horse which C received was to remain the property of A until the $15 was paid; but B, at the same time, told C that he might trade away the horse, provided he kept the security good. C, accordingly, changed horses three several times, and the horse which he obtained upon the third exchange, was attached by the defendant as the property of C. It did not appear that A had ratified the act of C in exchanging for that horse, and it was held that therefore the property in the horse had not vested in A, although the $15 remained unpaid at the time of the attachment, and that the horse was subject to attachment by the creditors of C. Bennett, J., said: "The question in this case is, had the property in the horse now in dispute, vested in the plaintiff at the time of the attachment? The case shows that Hunt had the bailment of the first horse to use, clothed with a power of sale. This, of course, was a personal trust, and the bailee had no authority to delegate this trust to another. The maxim is, *delegata potestas non potest delegari.*"

We have only cited a few cases to illustrate the principle last stated in this article; that there is no distinction with regard to the power of a trustee to delegate his discretionary powers, to be made between those cases where there is given the trustee a naked power, and where he has a power coupled with an interest. Such an important principle as this would have received more attention and a greater array of authorities would have been cited to support it, did not all the cases that we have criticised at length, fully demonstrate the fallacy of any such distinction. And to bring this principle more prominently before the reader's mind, each case has been analyzed and the facts briefly stated.

ARTHUR BIDDLE.

East, 118; Down v. Worrall, 1 Mylne and Keene, 561; Berger v. Duff, 4 Johns., Ch. 368, quoted with approval.

[17] 39 California, 290 (1870).

[18] *Supra.*

[19] *Supra.*

[20] *Supra.*

[21] p. 12.

[22] 22 Vt. 130, (1849).

AGREEMENTS TO COMPROMISE PROSECUTIONS.

I.

"No principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law," as Marshall, C. J., emphatically declared in Armstrong v. Toler (11 Wheat. 271); but, few principles have given rise to so much difficulty in application, or to so many nice distinctions. Public policy, upon which this principle so largely depends, is in itself uncertain and fluctuating; and, as has been pointedly said, it is an unruly horse, which once astride, you know

not where it will carry you (see Story Cont. s. 546; Richardson v. Melish, 2 Bing. 229; Boardman v. Thompson, 25 Iowa, 501); and as it is liable to vary with the growth of society and the usages and habits prevailing under changed conditions, the latest judicial opinions on its bearing and operation must necessarily possess a special importance; while the student of comparative jurisprudence must regard with special interest any development of doctrine on such a subject as exemplified by the modern decisions in different countries. One branch of law so affected, on which we find several recent authorities in England, Ireland and America, relates to agreements entered into for the purpose, or in consideration of the compromise of criminal prosecutions, and those cases we propose here to briefly collate.

The Irish cases, indeed, must be supposed to be already pretty familiar to our readers, and need less examination accordingly. See Rourke v. Mealy, 13 Ir. L. T. Rep. 52; London Guarantee and Accident Co. v. Fearnley, 14 Id. 59. The bearing of the last case cited is merely on the question of the duty of prosecution before seeking civil redress; but Rourke v. Mealy will be found to present an able and valuable discussion by Palles, C. B., of the principles upon which agreements to abstain from instituting, or proceeding with prosecutions of a public nature are deemed illegal. It is enough, however, to observe that it was there held that, while on the one hand, a contract to terminate or stifle a prosecution already commenced is illegal, irrespective of a crime having been in fact committed, or of the reasonable and probable grounds of belief in the guilt of the person charged, on the other hand, an agreement to abstain from instituting a threatened prosecution for a criminal offense is not illegal, unless there are reasonable grounds for believing that the alleged offense has been actually committed, or unless each party entered into the ageeement on that assumption. And in Swope v. Jefferson Fire Insurance Co. (10 Reporter, 282), decided last May, we find it held by the Supreme Court of Pennsylvania that, in order to avoid a contract or security on the ground that the consideration was the compounding of a crime, the proof of a mere threat of prosecution for a felony, if the instrument were not executed, is not sufficient, there being no proof of the felony or of an agreement not to prosecute. Another subject of decision in Rourke v. Mealy was, that an agreement not to prosecute is not equivalent to, nor does it involve an agreement not to give evidence upon a criminal prosecution instituted by another party. And here may be noted the case of Haines v. Lewis (10 Rep. 526), decided last September, in which we find it held in the Supreme Court of Iowa, that it is the right of the State to have the unbiased testimony of its witnesses in every criminal prosecution, and, therefore, an agreement tending to defeat this right is void as against public policy. The plaintiff sued for a note executed by one Danforth, and placed in the hands of defendant to be delivered to the plaintiff, in case one Ellen Patterson, a client of plaintiff, should sign a petition to the Governor asking for the pardon of Danforth for an offense of which he was convicted; or if the judgment was reversed on appeal, that she would forbear to prosecute. The court held that he could not recover, Adams, C. J., saying: "The plaintiffs' action is based upon an alleged agreement upon the part of the defendant to deliver to them the two notes made payable to them, and placed in the defendant's hands. With whom such an agreement was made, does not appear from the petition. If it was made solely between Danforth and the defendant, then the defendant was solely Danforth's agent or bailee, and the delivery by Danforth to his own agent or bailee was not such delivery as would put the notes in force. But if the petition had averred an agreement between the defendant and the plaintiffs, they would still not be entitled to recover, unless the agreement was of such a character that we could properly enforce it. The defendant insists that we can not, for the reason that it would be against public policy to do so. It is the right of the State to have the unbiased testimony of all its witnesses in every criminal prosecution. If the tendency of such agreement would be to defeat such right, it can not be upheld. All the notes, including those made payable to the plaintiffs, were executed for the benefit of Ellen Patterson, the prosecuting witness in the criminal case. From the time they were executed and deposited, she had a direct pecuniary interest, not only in securing Danforth's pardon, but, in case that was refused, and the case was reversed and remanded for another trial, in securing his acquittal. From most criminal acts there arises a civil liability, and the person injured is often the prosecuting witness. If the prosecuting witness and defendant can stipulate for the deposit of promissory notes or other property, by the defendant, to be delivered to the prosecuting witness in settlement of the civil liability in case the defendant escapes conviction, and not otherwise, and the courts will enforce such stipulations, it appears to us that such would become a favorite arrangement upon the part of the injured person to enforce the discharge of the civil liability, and upon the part of the defendant to defeat the administration of criminal justice. In this case it is true that there had already been a conviction, and it was hoped that a pardon would be secured; but the possibility of a failure to secure the pardon, and of a reversal by the Supreme Court, and another trial below, we think must have been contemplated by Danforth, and constituted a part of his motive in executing and depositing the notes."

Another question, in relation to the doctrine in hand, which we find to have been the subject of recent discussion both in England (Whitmore v. Farley, 43 L. T. N. S. 192), and America (McMahon v. Smith, 10 Reporter, 486; s. c. 47 Conn. Bredin v. Dorsey, 2 Ky. L. R. 20), is as to whether it is necessary that the crime compounded should

be a felony. Reserving the English case cited for fuller and separate discussion in a subsequent paper, we shall first refer to the American decisions. We find that in Partridge v. Hood, 120 Mass. 407, which was not cited in the recent cases next referred to, it was expressly held that it makes no difference whether the offense is or is not more than a misdemeanor. And in Bredin v. Dorsey (*ubi supra*). decided last year, the Supreme Court of Pennsylvania say: "It is the nature of the crime, not so much whether it be felony or misdemeanor, which is to be considered. Many felonies are not so enormous as some misdemeanors. The law recognizes this in their punishment; for instance, the maximum of imprisonment for one convicted of forgery is ten years, of larceny three. Stifling a prosecution for forgery, though an offense of the same grade as compounding divers felonies, seems to be a graver offense than compounding some felonies. It comes within the rule, that where the welfare of society and the vindication of the law are the chief objects, the defendant may give in evidence the illegality of the contract as a bar to a suit to enforce it, and this to prevent evil which would be produced by enforcing the contract, or allowing it to stand." To the same general effect is McMahon v. Smith (*ubi supra*), which was not there cited. But, as to the rule requiring criminal proceedings to be taken before civil, see The Hercules, 2 Dods. 376, *et cf.* Jones v. Clay, 1 B. & P. 91, mentioned in 13 Ir. L. T. 170. In M'Mahon v. Smith (*ubi supra*), decided last year by the Supreme Court of Connecticut, it appeared that a man having been arrested and lodged in jail upon a criminal proseeution against himself and his son, for obtaining goods under false pretenses, his wife agreed with the parties from whom the goods were obtained, and who had procured the prosecution, that she would give a note with her husband for the value of the goods and for the costs made, and secure it by a mortgage of her real estate, if they would procure the abandonment of the criminal proceeding and the release of her husband. The note and mortgage were given, and the prosecution was withdrawn. It was held, on a bill to foreclose the mortgage, (1) that a court of equity would not enforce a contract of suretyship so procured; (2) that the note was void as being upon an illegal consideration. Loomis, J., in delivering the opinion of the court, said: "We consider the case as stated controlled by the recent decision of this court in Town of Sharon v. Gager, 46 Conn. 189, which was a petition to foreclose a mortgage given by one Julia Gager, to secure the town against loss on account of the defalcation of her nephew while he was treasurer of the town. The mortgagor, being feeble in body and excitable in temperament, was approached by a selectman, who informed her that her nephew was a defaulter, and had exposed himself to a criminal prosecution punishable in the State prison, and that he would be so prosecuted and punished unless she secured the town immediately. In an agitated state of mind she executed the mortgage for the sole purpose of preventing a criminal prosecution. It was held that a court of equity would refuse to enforce a contract of suretyship entered into under such circumstances, and that it did not alter the case that the selectman believed that the nephew was liable to punishment in the State prison. The decision was based on the authority of the cases of Williams v. Bayley, L. R. 1 Eng. & Ir. App. House of Lords, 200, and Davies v. Ins. Co., L. R. 8 Chan. Div. 469, from which full citations were made. In a case like the present, where the intimate relation of husband and wife, or mother and son, exists between the persons accused and the surety, and the husband is actually under arrest, and an express agreement to stifle a pending public prosecution is made and actually consummated, a court of equity is bound to notice, not only the principles of public policy violated, but also the manifest inequality of the parties to the contract, and the unfair advantage taken by one to force an agreement from the other, under the immense pressure which the circumstances must inevitably have produced, and should upon every principle declare that the person so compelled to give security was not a free and voluntary agent, and that the agreement so made must be set aside. But it is argued, in behalf of the petitioners, that, to set aside such a contract, the offense to be compounded must be a felony and not a mere misdemeanor, and that where the parties have a civil remedy, they may agree not to prosecute criminally. It is quite true that a person may settle any claim of private damage as he sees fit, only he may not compromise a public prosecution. But the right to stifle a prosecution does not turn on the question whether the offense is a felony or a misdemeanor. All the authorities hold that an agreement to compound a felony will not be enforced, and that any security based upon such a consideration is void. But as to misdemeanors, a distinction has been made. Some authorities hold that those misdemeanors which are personal in their nature between the parties, such as bastardy and a common assault, unaccompanied with riot or intent to kill, may be compromised. Maurer v. Mitchell, 9 W. & S. 69; Robinson v. Crenshaw, 2 Stew. & P. 276; Price v. Summers, 2 South. 578; Holcomb v. Stimpson, 8 Vt. 141. The last case was a prosecution for bastardy, and the decision was placed on the ground that it was a civil suit. But where the offense is in whole or in part of a public nature, nearly all the authorities hold that no agreement to stifle a prosecution for it can be valid. Fay v. Oatley, 6 Wis. 42; Commonwealth v. Johnson, 3 Cush. 454; Hinesborough v. Sumner, 9 Vt. 23; Bowen v. Buck, 28 Ib. 308; Shaw v. Reed, 30 Me. 105; Shaw v. Spooner, 9 N. H. 197; Clark v. Ricker, 14 Ib. 44; Kimbrough v. Lane, 11 Bush, 556; Peed v. M'Kee, 42 Iowa, 649; Buck v. Bank, 27 Mich. 293; Gardner v. Maxey, 9 B. Mon. 90; Kier v. Lehman, 6 U. B. 308. The offense com-

promised in the case at bar was clearly of a public nature, involving moral turpitude and affecting the public morals. We, therefore, hold that the mortgage security taken by the petitioners can not be enforced."—*Irish Law Times.*

DAMAGES — NEGLIGENCE — SIDEWALKS.

BUESCHING v. ST. LOUIS GASLIGHT CO.

Supreme Court of Missouri, March 7, 1881.

1. An owner of premises adjoining a sidewalk has, in the absence of any law or ordinance to the contrary, a right to make and maintain on his land, an opening or excavation, abutting upon that sidewalk; but it is his duty to so guard it as to render the sidewalk ecure for persons using it, and his neglect to do so will render him liable to all persons thereby injured while lawfully using the sidewalk, and in the exercise of ordinary care.

2. The want of such guards creates a public nuisance, and if the owner lets the premises, and the tenant allows it to remain, they are jointly and severally liable for injuries occasioned thereby, and it is no defense that the premises had been in the same condition as far back as could be remembered, and many years before defendant was in possession of them.

3. It is not incumbent on the plaintiff in the first instance to show that he was free from negligence at the time of the injury—but contributory negligence on his part is a matter of defense, and the burden of showing it is on the defendant. If, however, it appears without any conflict of evidence from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it is the duty of the court to take the case from the jury.

4. In passing on a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which the jury might with any degree of propriety have inferred in his favor; and if then it is insufficient to support a verdict in his favor, the demurrer should be sustained. And, in passing on the demurrer, the court can not make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of law or inferences of fact in favor of plaintiff. The rule applied to case at bar.

5. A traveler is not required to abandon a convenient or an accustomed route of travel because of dangerous excavations near the highway, unless the use of the way, under such circumstances, would be inconsistent with the exercise of reasonable or ordinary care; and the traveler, if injured, under such circumstances, may recover, notwithstanding his knowledge of the existence of the nuisance, provided he was at the time using ordinary care.

6. Where the deceased fell into an opening on premises abutting or adjoining a highway, the law is that he was guilty of negligence if he did not see it, provided he would have seen it by using ordinary care; and, if he saw it, he was guilty of negligence in not avoiding it, if he could have avoided it by the exercise of ordinary care; and the law presumes the exercise of ordinary care on the part of deceased, which presumption is not overthrown by the mere fact of injury. Slight circumstances, however, from which contributory negligence may be inferred, may overcome this presumption, and it is for the jury and not for the court to draw such inferences.

7. Although, under some circumstances, an instruction, by reason of its phraseology, might be misunderstood and mislead the jury, yet if it appears that such was not in fact the case, and that it could have worked no injury, the cause will not be reversed.

Appeal from St. Louis Court of Appeals.

Slayback & Haeussler, for appellants. *Cline, Jamison* and *Day*, for respondents.

The following were the instructions given for plaintiff:

1. The court instructs the jury, that if they believe from the evidence, that the premises described in the petition, at the time therein alleged, belonged to the defendant, and that the opening to the cellar stairway was so constructed as to render the same insecure, dangerous and insufficient to protect passers by, and that from all the testimony and circumstances admitted in evidence, that plaintiff's husband, while exercising ordinary care on his part, was injured in consequence of the careless or negligent manner in which the alley-way or opening thereto was constructed and guarded by defendant, then the plaintiff is entitled to recover, and the finding of the jury should be for plaintiff.

2. The court declares the law to be, that ordinary care means that degree of care which may reasonably be expected of a person in the situation of plaintiff's husband at the time the accident occurred. If the jury are satisfied from the evidence, that while the plaintiff's husband was exercising such ordinary care, he was injured by negligence of the defendant; and shall further find from the evidence, the defendant's negligence was the direct, immediate and proximate cause of the injuries complained of, and without which the accident could not have taken place, then plaintiff is entitled to recover in this action, and the verdict should be for plaintiff. Although the jury may find from the evidence that, at the time of the alleged death of the plaintiff's husband, the defendant was not in actual possession of the premises described in the petition, yet, if they shall further find from the evidence that said premises were in the same condition as when originally constructed, and that when defendant surrendered the control of the premises to Barnes, the opening of the cellar-way was in the same condition as when the accident complained of occurred, and that the same was so unguarded and unprotected as to be dangerous and insufficiently constructed; and that while exercising ordinary care on his part, the plaintiff's husband fell into said cellar-way, and died from injuries that were occasioned by such negligent construction of said premises, then defendant is liable in this action, and the verdict should be for plaintiff.

3. If the jury find for plaintiff, they should assess her damages at such sum as they may deem fair and just under the circumstances shown in evidence, not exceeding five thousand dollars.

The instructions given for defendant were as follows:

1. If the jury find that the injuries and death of said Buesching was directly caused, either in whole or in part, from the want of ordinary care and prudence on his part, then plaintiff can not recover. If the jury find from the evidence, that the existence of the passage-way in question, was, on the night of the accident, lit up by a public lamp, standing on the opposite side of the street, and that it was in open and plain view of deceased; or that he, by the exercise of ordinary care, could have seen it, then plaintiff can not recover, and you must find for the defendant.

2. If the jury should find from the evidence, that the night on which the deceased was killed was dark and rainy, and that the street was not lit up by the lamps near the place of the accident, so as to enable him to see the stairway in question, then the law required of him a greater amount of care in traveling on the street or alley, so as to see that he was in the open and usual way of travel, and not bringing himself in danger of falling into openings, stairways and steps leading into the building on the line of the street.

3. The jury are instructed that the law imposes on persons traveling upon the public streets and alleys of the City of St. Louis, the duty of exercising reasonable and ordinary care and prudence to avoid the dangers incident to such travel. And if you find from the evidence that the death complained of, was caused by a want of ordinary care in deceased, or his failure to look with ordinary care to his steps, so as to avoid danger and injury, or that he might have seen and avoided the stairway by the exercise of ordinary care and prudence, then the plaintiff can not recover.

4. If the jury find from the evidence in the cause, that the deceased knew of the existence and location of the steps leading into the basement of the defendant's house, or could have seen and avoided the same by the exercise of reasonable care while passing on the street, or coming out of the alley, then the plaintiff can not recover.

The defendant also asked the court to give the following instruction, which was refused:

If the jury find from the evidence that the defendant made the passage leading from Pine street to the basement of its building in question, and that the same was inclosed by a firm iron railing, excepting the entrance thereto, and that the same was near to, and well lit by a public street-lamp, and had been so situated and used for the last twenty years, as the means of going into and out of said basement in said building; and that said defendant had no reasonable grounds of believing that anyone passing thereby, with due care and caution, would fall therein, or be injured thereby, then the plaintiff can not recover, and you must find for the defendant.

The other facts sufficiently appear in the opinion.

HOUGH, J., delivered the opinion of the court:

This was an action against the St. Louis Gaslight Company as owner, and one Barnes, the tenant in possession of a certain building on Pine street, in the City of St. Louis, for negligence in not guarding the entrance to an area or opening in front of said building, and abutting upon the sidewalk into which it is alleged plaintiff's husband fell on the night of January 22d, 1876, and was thereby killed. The building in question is located on the north side of Pine street, and on the west side of and adjoining an alley which runs north and south through the block lying between second and third streets. All the houses on the north side of Pine street between the alley and Third street are set back two feet and six inches from the north line of the sidewalk. The opening in question is about eight feet long east and west, three feet nine inches deep, and two feet five inches wide, and is, therefore, outside the sidewalk, and on defendant's ground, and being designed to furnish means of descent to the cellar or basement of this building, had five straight stone steps, and two winding ones at the bottom, leading to the basement door. The top step, which is eight inches wide, is flush with the east wall of the building which is on the west line of the alley, and the descent into the cellar, therefore, begins just eight inches from the east wall. This opening is guarded by a railing at the west end, and had also a railing on the south side extending to within two feet of the east edge of the top step, so that persons might step from the sidewalk on the second step. But the eastern end or entrance had no guard or barrier of any kind. There are several openings of the same kind in the block, and the testimony tended to show similar openings existed throughout the city. Buesching, at the time of his death, kept a saloon on Chestnut street between Main and Second streets, two blocks distant from the place of the accident, and lived with his family over his saloon. He was an industrious man, attentive to his business, and, though in the habit of drinking, was not a drunkard. He was last seen alive by the barber at a shop on Olive street near Second, who knew him well, and had been in the habit of shaving him every Saturday night for two years. At nine o'clock, P. M. of January 22d, which was Saturday, Buesching went to this barber shop and was shaved. He waited until the shop was closed and asked the barber to drink with him, which he declined to do. It does not appear that deceased took a drink, and the testimony is that there were no saloons then open in that vicinity. The barber testified that when he was at the shop he was rational and knew what he was about. He could not say that he had been drinking, for he saw no effects of it. He further testified: "He might have been drinking, but I never saw him so intox-

icated as not to be able to take care of himself and to walk, and never saw him stagger, and never saw him affected by liquor." They walked together from the shop to the corner of Second and Olive streets where they separated, about a quarter to ten o'clock, the barber going west on Olive and the deceased going north on Second. At this time it was thawing and raining, the walks were muddy and slippery, and Buesching was wearing low cut slippers and had neither overcoat nor umbrella. He was never seen alive afterwards. On the next morning about seven o'clock he was found dead at the bottom of the cellar entrance in front of the Gas Company's building, lying on his back with his feet up the steps and his head against the basement door, with his neck broken, and no marks of personal violence on his body. His watch and other valuables were on his person. His pantaloons were unbuttoned for a short distance in front, and there was a urinal in the alley. There was a gas lamp burning that night on the opposite side of the street, thirty-four feet from the cellar way, in which Buesching was found. He had kept a saloon for six years at the corner of Second and Pine streets, half a block distant from this cellar way, which had then been there for nearly twenty years. The plaintiff recovered judgment in the circuit court, which was reversed by the Court of Appeals, the latter court holding that on the facts stated, the circuit court should have taken the case from the jury. The plaintiff brings the case here by appeal.

As the opening was on the defendant's own ground, although abutting upon the sidewalk, they had an undoubted right, in the absence of any law or ordinance to the contrary, to make and maintain it; but it was their duty to so guard the entrance as to render it secure for persons using the sidewalk; and they are liable to all persons lawfully using the sidewalk who, while exercising ordinary caution, are injured thereby. This, we think, is well established by the authorities. In Cooley on Torts, p. 660, it is said: "If one make an excavation so near the line of the highway, that one lawfully making use of the highway, might accidentally fall into it, his duty to erect guards as a protection against such accidents is manifest, and he will be responsible for injuries occasioned by his neglect to do so." In Sherman & Redfield on Negligence, sec. 360, it is said: "Where an area is excavated by the side of the street, it must be surrounded by a secure fence; and where an opening is made into a cellar, it must be covered with a lid or flap of ordinary and sufficient strength. The want of such guards creates a public nuisance, for which the tenant is liable to any person injured thereby, even though the premises were leased in that condition." If the owner lets the premises, with the nuisance upon it, and the tenant allows it to remain, they are jointly and severally liable for injuries occasioned thereby. Id. sec. 361. In Coupland v. Hardingham, 3 Camp. 398, it appeared that there was an area in front of the defendant's house, which was descended to by three steps from the street, and from which there was a door leading into the basement story of the house; there was no railing or fence to guard the area from the street, and the plaintiff passing by in a dark night, fell into it and had his arm broken. The defense set up was, that the premises had been in exactly the same situation as far back as could be remembered, and many years before the defendant was in possession of them. Lord Ellenborough said, that however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been exposed, and that he was liable for the consequences of having neglected to do so, and the learned judge said that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house to render it secure. Thompson on Neg. 327. In Jarvis v. Dean, 3 Bing. 347, the plaintiff recovered damages for injuries sustained by falling into an open, unguarded area adjoining the street, and no question was made as to his right of action. Barnes v. Ward, 67 Eng. Com. Law, 392 (9 M. G. & S.), was an action under Lord Campbell's Act, brough by the administrator of Jane Barnes, to recover damages for her death, occasioned by the failure of the defendant to properly guard, fence off and rail in a certain hole, or area, abutting upon the foot-way, into which, while lawfully passing upon said foot-way, she slipped and fell. This case was most elaborately argued, and in consequence of doubts entertained by the court as to the duty of the defendant to fence off the excavation, a second argument was directed, and, after the fullest consideration and an examination of the original *nisi prius* records in Coupland v. Hardingham, and Jarvis v. Dean, as to the location of the area in question in those cases, the court said: "It appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the land." So, also, in the case of Hadley v. Taylor, Law Rep. 1 C. P. 53, Erle, C. J., said: "The plaintiff seeks compensation for an injury which he has sustained through falling into a hole on the defendants' premises. The hole was not upon the public highway, but distant from it about fourteen inches. I think, however, the defendants (assuming them to be in possession of the adjoining premises) would be liable for a nuisance to the highway, if the excavation were so near to it that a person lawfully using the way, and using ordinary caution, accidentally slipping, might fall into it." To the same effect are Snow v. Provincetown, 120 Mass. 580; Bush v. Johnston, 23 Pa. St. 209; and TemperanceHall Association v. Giles, 33 N. J. Law Rep. 260. In the case last cited, it was held, that in order to show that the area in question was not a nuisance, it was not competent to prove that over a thousand persons had passed and repassed the area every year after

it was made without accident; that such areas were common in the city, and that it was the custom to protect them as the area in question was protected.

There can be no question, then, as to the liability of the defendants, if the deceased was, at the time he was precipitated into the opening, in the exercise of ordinary care. It has been repeatedly decided by this court, that it is not incumbent upon the plaintiff, in the first instance, to show that he was free from negligence, or in the exercise of ordinary care at the time of receiving the injury complained of, but that the concurring negligence of the plaintiff is a matter of defense, and the burden of showing it is therefore on the defendant. If, however, it appears without any conflict of evidence from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it would be the duty of the court to take the case from the jury by declaring, as a matter of law, that the plaintiff can not recover.

We are thus brought to a consideration of the main question in the case. Has the Court of Appeals erred in deciding that the circuit court should, on the plaintiff's own testimony, have declared that the plaintiff could not recover? The point is not without difficulty. Two main facts, however, are clear. First, that the defendants were guilty of negligence in leaving the opening unguarded at its entrance. Second, that the plaintiff's husband was found on the morning of January 23, 1876, lying on his back, with his neck broken, his head and shoulders at the bottom of the passage, and his feet and limbs resting on the steps above him; his body free from any marks of personal violence, and his watch, money and other valuables unmolested. We think it a fair and reasonable inference, from the surroundings and condition of the deceased when found, that he was not murdered, although the facts proven do not absolutely exclude the possibility of murder. There is no presumption of law that the deceased committed suicide; and if his surroundings, when found, did not indicate how he came to be there, the presumption would be that it was the result of accident. Lancaster v. Ins. Co., 62 Mo. 129.

It is not shown how or at what hour he got there. No witness saw him fall, but his position and condition when found would indicate that he did fall, either sidewise or backward, headlong down the steps. The physical facts just mentioned, taken by themselves, are sufficient to warrant a jury in drawing such an inference as to the manner of his death. Courts and juries constantly act upon such testimony, and we do not understand its sufficiency for this purpose to be denied by the counsel for the defendants. Taking it for granted, then, that Buesching fell into the opening, or what is tantamount thereto, that there is testimony from which that fact could be found, the next question is, is there evidence on which a jury should be permitted to find that at the time of his fall, the deceased was in the exercise of ordinary care? The argument of defendants' counsel is, that, if the deceased saw this entrance, he was negligent in not avoiding it. If he did not see it, he was negligent in not looking, as it was in plain view and well known to him, and had been for years before. That ordinary care and prudence required him to look to his steps; and had he done so, he could not have failed to see it, and therefore it follows he came to his death by reason of his own negligence contributing thereto.

It does not appear from direct and positive testimony, that the deceased knew of the existence of the opening in question. One witness does indeed say, "he knew of the condition of the street, for it had been in the same condition for ten or fifteen years;" but the statement plainly imports no more than that the witness supposed he knew it, because it had existed for ten or fifteen years. Knowledge on the part of the deceased may, however, be inferred from the fact that he lived for several years on the same street, within half a block of the opening. But this is an inference of fact favorable to the defendant, which it is not permissible for the court to draw, in passing upon a demurrer to the evidence. Such inference could only be drawn by a jury after the submission of the cause to them on the merits. In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor; and if, when viewed in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained. Wilson v. Board of Education, 63 Mo. 137. But the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of law or inferences of fact in favor of the plaintiff; that would clearly be usurping the province of the jury. So that if it were essential in order to sustain the demurrer to the evidence, that it should appear to the court at the close of the plaintiff's case, that the deceased had knowledge of the opening in question, inasmuch as such knowledge could only appear by way of inference in favor of the defendant from the facts which were proven, the demurrer could not be sustained. In weighing the argument of the defendant, then, the element of previous knowledge of the nuisance is to be eliminated. It may be proper, however, to remark in this connection, that the rule which obtains between master and servant, where there is knowledge on the part of the latter of dangerous defects in tools, apparatus, machinery, structures or grounds furnished by the master, with which or in which, as the case may be, the servant is required to work, is inapplicable in its fullest extent to the relation which exists between a traveler upon a highway and the proprietor of the adjacent lands, who maintains a nuisance thereon, abutting upon the highway and likely to produce injury. In the former case, un-

less there is complaint by the servant, and a promise to repair by the master, the servant is held to assume the risk, if he remains in the master's employment. In the latter case, no person is required to abandon a convenient or accustomed route of travel in a city, because of dangerous excavations near the highway, unless the use of the way under such circumstances would be inconsistent with the exercise of reasonable and ordinary care (Barton v. Springfield, 110 Mass. 131; Snow v. Provincetown, 120 Mass. 580), and the traveler, if injured thereby, may recover, notwithstanding his knowledge of the existence of the nuisance, provided he was at the time using ordinary care. Smith v. City of St. Joseph, 45 Mo. 449; Thompson on Negligence, pp. 1203-4-5-6; Sher. & Redf. on Negligence, § 414. The argument for the defendant, then, with the element of previous knowledge eliminated, stands thus: As the opening was not concealed, but was obvious to the sight, the deceased was guilty of negligence if he did not see it; and if he did see it, he was guilty of negligence in not avoiding it. These propositions are stated as abstract propositions, which must, if true, obtain in all cases, and not in this case only; for the circumstances under which Buesching failed to see the cellarway, or, seeing it, failed to avoid it, are not shown by the testimony. These propositions, then, if they are true and mean anything as applied to this case, mean that Buesching should, no matter what the circumstances surrounding him at the time, have seen the hole into which he fell; and, seeing it, should, no matter how great the difficulty of so doing, have avoided it. If such be the law, it is quite plain there never could have been a recovery for an injury occasioned by an obvious defect in a highway. But such is not the law. The law is that the deceased was guilty of negligence if he did not see it, provided he would have seen it by exercising ordinary care, and, seeing it, he was guilty of negligence in not avoiding it, provided he could have avoided it by the exercise of ordinary care. Now the law presumes that the deceased was in the exercise of ordinary care; and this presumption is not overthrown by the mere fact of injury. Sher. & Redf. on Neg. sec. 44; Hoyt v. City of Hudson, 41 Wis. 105, 111; Gay v. Winter, 34 Cal. 153. This presumption of due care always obtains in favor of a plaintiff in an action to recover damages for an injury sustained by him through the alleged negligence of another. If it were otherwise, the decisions of this court, which require the defendant to plead and prove as a defense the contributory negligence of the plaintiff or deceased, would be absurd. Slight circumstances, however, in the absence of direct evidence, may overcome the presumption of freedom from negligence which the law indulges. The habits and character of the person injured, his mental and physical condition when last seen before the injury, the location and character of the object or instrumentality causing the injury, and the nature of the injury itself, are all to be taken into consideration by the jury in determining whether he was free from fault when injured. In the case before us there is no testimony whatever showing what the conduct of the deceased was when he fell into the opening, and the presumption of law being that he conducted himself with due care, it was for the jury to draw such inferences from the facts in evidence as would overthrow that presumption, and not for the court. Barton v. Railroad, 52 Mo. 253; Fernandez v. Sacramento City, 52 Cal. 45; Hoyt v. City of Hudson, 41 Wis. 105, 111; Gay v. Winter, 34 Cal. 153. If it clearly appeared from the testimony of the plaintiff, without any contradiction, that the deceased was, when last seen, so intoxicated as to be incapable of exercising ordinary care, the circuit court might very properly have taken the case from the jury. But such is not the testimony. We are of the opinion that the circuit court did right to submit the case to the jury.

This being so, it only remains to inquire whether there is any error in the instructions given at the request of the plaintiff. Only one instruction asked by the defendant was refused, and that was properly refused. It does not correctly state the law. The only instruction given for the plaintiff which is commented upon adversely by the court of appeals, and, indeed, the only one about the correctness of which there can be any question, is the third, the first paragraph of which defines ordinary care as follows: "The court declares the law to be that ordinary care means that degree of care which may reasonably be expected of a person in the situation of plaintiff's husband at the time the accident occurred." It is objected that as there was some testimony from which a jury would be at liberty to infer that the deceased was not entirely sober at the time of the accident, this instruction was calculated to mislead, as what is known to the law as ordinary care is not to be expected of a person not entirely sober. We do not understand the word "situation" in this instruction to be used as denoting the physical and mental condition of the deceased, but as referring to his probable surroundings at the time of the accident. Under this instruction, if the jury believed that the deceased was not in a condition of mind or body to exercise that degree of care called for by his "situation" or surroundings, of course they should have found for the defendants, and we see nothing in the case calculated to prevent them from taking that view of the instruction. The same phraseology is employed in some text-books and in some adjudged cases, and it might, under some circumstances, be misunderstood and be calculated to mislead a jury; but, as we find no reference whatever in the instructions of the defendant, or any of the instructions for the plaintiff, to the physical or mental condition of the deceased, it is fair to presume that no such question was made before the jury. We think it plain, therefore, that the defendants have suffered no injury from

the use of the word "situation" in the instruction. It is unnecessary to comment upon the instructions given for the defendants. What we have said will indicate how far we deem them correct.

The judgment of the Court of Appeals will be reversed, and that of the Circuit Court affirmed. The other judges concur, except SHERWOOD, C. J., who did not sit.

CONSTRUCTIVE NOTICE — NOTICE TO SOLICITOR.

ALLEN v. LORD SOUTHAMPTON; ROPER'S CLAIM.

English High Court of Justice, Chan. Div., December. 1880.

S borrowed 6000*l* of B, his solicitor. Of this money 800*l*. belonged to R, another client of B. B took a mortgage in his own name without disclosing to S that any part of the money belonged to B, but gave R a declaration that he held 800*l*. on trust for him The mortgage of 6000*l*. was paid off in B's lifetime. B appropriated R's 800*l*., but continued to pay interest till his death, when his estate was found to be hopelessly insolvent. An action was then brought by the trustees of S for the administration of his estate. R claimed to have his debt paid out of the estate of S on the ground that S had constructive notice that the 800*l* belonged to him. *Held*, that it was the duty of B, as the solicitor of S, to give him notice that part of the mortgage money belonged to R, but it was more incumbent upon him to give such notice as the solicitor of R, and therefore R must suffer for the breach of duty which was committed by B as his solicitor.

Adjourned summons. On the 2d of March, 1860, Lord Southampton executed a mortgage of the manor of Tottenham to his solicitor, J. Birt, for 6000*l*. John Clarke Roper, another client of Birt's, placed in his hands, whether before or after the date of the said mortgage did not appear, a sum of 800*l*. for investment. By an indenture dated the 6th of March, 1861, made between J. Birt of the one part, and J. C. Roper of the other part, after reciting the said mortgage, and that 6000*l*. and an arrear of interest was still due thereon, and that 800*l*., part of the said 6000*l*., was the proper money of the said J. C. Roper; the said J. Birt declared that he, his executors and administrators, would stand possessed of 800*l*., part of the said 6000*l*., and the interest thereon, in trust for the said J. C. Roper, his executors, administrators and assigns. Lord Southampton died on the 16th of July, 1872. Birt continued to act as solicitor to his trustees, and in the transactions between them the sums owing on the said mortgage were paid off. No notice of the trust in favor of Roper was ever given to Lord Southampton or his trustees, but Birt continued to pay Roper interest on the 800*l*. until his death. Birt died on the 14th of February, 1876. It was then found that his estate was hopelessly insolvent, and indebted to that of Lord Southampton in the sum of 10,000*l*. or upwards. Lord Southampton's trustees then brought this action for the administration of his estate, and Roper took in a claim against that estate for the 800*l*. secured by the said declaration of trust.

Glasse, Q. C., and *Nalder*, for the summons. It was the duty of Birt to give notice of Roper's charge to Lord Southampton, and the rule is strict that notice to a solicitor of that which it is his duty to communicate to his client, raises a presumption of notice to the client, which he is not permitted to rebut. They cited: Bradley v. Riches, 39 L. T. R. (N. S.) 78; L. R. 9 Ch. Div. 189; Rolland v. Hurt, 24 L. T. R. (N. S.) 250; L. R. 6 Ch. 678; Espin v. Pemberton, 32 L. T. R. (N. S.) 250, 345; 3 De G. & J. 547. Saffron Walden Building Society v. Rayner (43 L. T. R. N. S. 3; L. R. 14 Ch. Div. 406), is a wholly different case.

J. Pearson, Q. C., and *Vaughan Hawkins*, for Lord Southampton's trustees. This is simply the ordinary case of a mortgage given to trustees where trustees advance the money, and no notice ever is or ought to be given of the trusts. [They were stopped by the court.]

Glasse, Q. C., in reply.

MALINS, V. C.—This is a case in which the usual question arises upon the fraud of a solicitor, as to which of two innocent parties is to suffer. On the 2d of March, 1860, Lord Southampton executed a mortgage to his confidential solicitor, Mr. Birt, for 6,000*l*. Now, Lord Southampton never had from the first to the last the slightest intimation from Mr. Birt or anyone else, that the whole of this 6,000*l*. did not belong to Mr. Birt. But Mr. Roper, who was as innocent in the transaction as Lord Southampton himself, had also the misfortune to have Mr. Birt for his solicitor, and Mr. Birt having money in his hands belonging to Mr. Roper at that time, or subsequently obtaining it from him, made a declaration of trust dated the 6th of April, 1871. I infer from the date that the putting of 800*l*. into Mr. Birt's hands for investment was subsequent to the 2d of March, 1860; for the deed recites that there is now due and owing to Birt on the said mortgage security the sum of 6,000*l*., with an arrear of interest, and that 800*l*., part thereof, is the proper money of John Clarke Roper; and then there is a declaration that Jacob Birt holds 800*l*., part of the 6,000*l*., in trust for Mr. Roper. Now time goes on. Lord Southampton pays off the mortgage through Mr. Birt without ever having had the slightest intimation that any other person than Mr. Birt was interested in the matter. This is agreed on. Mr. Glasse says that it was the duty of Mr. Birt to tell Lord Southampton of this, and I quite agree it was his duty, and if he had been an honest man he would have told him; but he was a dishonest man, and did not perform the duty which was obviously imposed

upon him of telling Lord Southampton that it was not his money, but the money of other persons, because then Lord Southampton would have been protected by not paying Mr. Birt, but paying to those who he had notice were the real owners of the money. But Mr. Birt was also the solicitor of Mr. Roper, and if it was the duty of Mr. Birt to tell Lord Southampton that the money did not belong to him but to Mr. Roper, surely it was much more his duty to Mr. Roper to tell Lord Southampton that Mr. Roper was the owner of the money, because his duty to Mr. Roper made it absolutely incumbent on him to do so; otherwise there was danger of Lord Southampton paying to Mr. Birt and getting a discharge for the money, whereas in fact, it ought to have been paid to Mr. Roper. Mr. Birt was the solicitor of Mr. Roper as well as of Lord Southampton; he was guilty of neglect to each of them, and I say more, flagrantly to Mr. Roper than to Lord Southampton; and the question is, who, under these circumstances, ought to suffer? If it was the duty of Mr. Birt, on the part of Mr. Roper, to inform Lord Southampton, why is he to suffer? Why is not Mr. Roper to suffer for his not having performed this duty, because he trusted his agent, Mr. Birt, and his agent betrayed him, and did not perform his duty? I put this case in the course of the argument: Suppose Lord Southampton, having borrowed this money from Mr. Birt, Mr. Birt had transferred the whole debt to John Smith, but never informed Lord Southampton, and retained the mortgage deed. It would have been his duty to inform Lord Southampton, but he does not do so; and Lord Southampton, in total ignorance, finding him in possession of the mortgage deed, pays him the money and takes his receipt. Does anyone say that John Smith would have equity against Lord Southampton to obtain payment? What is the difference between that case and this? Mr. Roper, by not giving notice, has enabled Lord Southampton to pay Mr. Birt, and Lord Southampton has paid him. On what principle should he be called upon to pay the money over again, because he had a dishonest solicitor who ought to have told him? I am unable to see why. The case seems to me totally different from all other cases that have occurred. With regard to the case so much relied upon before Fry, J. (Bradley v. Riches, *ubi sup.*), it is only necessary to say that it proceeds upon a totally different state of circumstances. It is not necessary for me to say whether I agree with that case or not. It proceeds upon an entirely different state of facts, though it is a case in which at present I am unable to see the grounds of the decision. Then Mr. Glasse relies on the case of Rolland v. Hart (*ubi sup.*). There the head note says: "A solicitor induced a client to advance money for A on mortgage of lands in Middlesex, and soon afterwards induced a second client to advance money upon a mortgage of the same lands without informing him of the existence of the first mortgage." Therefore, there, as the client employs the solicitor, and the solicitor has notice of the prior incumbrance, the rule is, in the same transaction notice to the solicitor is notice to the client. "The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered. *Held* (reversing the decision of the Master of the Rolls), that the holder of the second mortgage must be taken to have had through his solicitor notice of the first mortgage, and did not by the prior registration obtain priority." Having notice of the first mortgage, he could not obtain priority by getting in the legal estate or anything else. Rolland v. Hart, therefore, when you look at it, is nothing more than the application of the well-considered rule of this court, that where there is notice to the solicitor in the same transaction, it is notice to the client, although, as Lord Hatherley most properly says, the unfortunate client, if he was a purchaser or a mortgagee, never knows anything of the title, and relies upon the solicitor. That is the well-established rule of the court. But this case, I think, is different from any case cited to me, and probably from any case which has hitherto occurred. Therefore, finding there are two clients, each employing the same solicitor, who has been guilty of a failure of duty towards both, and, as I say, more flagrantly towards Mr. Roper than towards Lord Southampton—a failure of duty towards Mr. Roper, because Mr. Birt was bound to do for him everything which an indifferent solicitor was bound to do, and an indifferent solicitor would most unquestionably have been bound to give Lord Southampton notice—can I remove all the consequences of the neglect of duty from one innocent party to the other, while the real neglect of duty was in Mr. Birt not giving notice to Lord Southampton of the incumbrance of Mr. Roper? If Mr. Roper had employed a separate solicitor, if that solicitor had given no notice to Lord Southampton of the mortgage, payment to Mr. Birt would have been good payment. I am unable to see any principle on which he can be in a better position because he employed the same solicitor as Lord Southampton, who, having a duty to each, failed in his duty to each, and in that manner caused a loss to Mr. Roper. The summons must be dismissed.

This being a test case, the costs were by consent ordered to be paid out of Lord Southampton's estate.

NOTE.—The courts are frequently called upon to adjust the adverse rights, which have been acquired by several persons *bona fide* and in ignorance of the true state of facts through the deception practised by another; and in reaching a determination the doctrine of notice is invoked, whereby the consequences may be the same, though the party may have no actual knowledge of the facts. Constructive notice arises where the party might, by reasonable diligence or caution, have ascertained the facts; and, "whatever is notice enough to excite attention and put the

party on his guard and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation." Per Lord Ch. Brougham, Kennedy v. Green, 3 Myl. & K. 719. See, also, Ogilvie v. Jaeffereson, 2 Giff. 353.

Imputed notice arises by inference of law which prohibits a denial of knowledge by a principal, of facts which were known to his agent, without regard to whether the agent in fact communicated such knowledge to his principal.

In England, and in some of the United States, the rule is that notice is imputed to the principal of all facts of which the agent had knowledge in relation to the transaction in which he is employed, whether gained in that transaction or otherwise, subject to the following exceptions, viz.: 1. Facts which came to the knowledge of the agent prior to his employment, but which he has forgotten. 2. Facts which the agent could not divulge; *e. g.*, professional confidences. 3. Facts, by the concealment of which the agent contemplates defrauding his principal.

The rule which imputes notice to the principal of facts which came to the knowledge of the agent prior to his employment, arises from a duty which the law imposes, and presumes is performed, save in the three exceptions above mentioned, that the agent will communicate such facts to his principal. The rule in most of the United States is, that notice will be imputed of such facts only as come to the knowledge of the agent during his employment in the particular transaction. The rule thus laid down is simple, and avoids those embarrassing refinements which have brought into the English authorities so much confusion and uncertainty. We will cite a few of the English cases which seem to contain the law as it now stands.

In Mountford v. Scott, 3 Mad. 40, Sir John Leach held that, "The agent stands in the place of his principal, and notice, therefore, to the agent is notice to the principal; but he can not stand in the place of the principal until the relation of principal and agent is constituted; as to all the information which he has previously acquired, the principal is a mere stranger." But Lord Eldon, on appeal, overthrew this doctrine (s. c. 1 Turn. & Russ. 279), and observed: "The vice-chancellor in this case appears to have proceeded upon the notion that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered whether one transaction might not follow so closely upon the other, as to render it impossible to give a man credit for having forgotten it." The question was one of recollection which must in each case depend upon the circumstances. In Dresser v. Norwood, 17 Com. Ben. (N. S. Edit. W. W. Wister, Jr.) 466, the rule was firmly established that imputed notice was not limited merely to knowledge acquired by agent in the course of the particular transaction. See note to this case, and also, Rolland v. Hart, 6 Ch. App. (L. R.) 682.

Some American cases support the English doctrine. In Pritchell v. Sessions, 10 Rich. Law, 293, it was held that the knowledge of the agent must be acquired either in the very transaction "or so near before it that the agent must be presumed to recollect it. * *" See, also, The Distilled Spirits, 11 Wall. 356; Williams v. Tatnall, 29 Ill. 553; Flower v. Elwood, 66 Ill. 441; Wiley v. Knight, 27 Ala. 336; Hart v. Bank, 33 Vt. 252; Patten v. Ins. Co., 40 N. H. 375.

In Kennedy v. Green, 3 Myl. & K. 699, Lord Brougham established a limitation of the rule laid down by Lord Eldon in Mountford v. Scott, which is the one embraced in the third exception above mentioned. An attorney had induced his client, B, by fraud to execute a conveyance to him of certain property, and subsequently secured from C a loan upon the security of it. The Master of Rolls held, that as the attorney represented C as well as B, the knowledge of the attorney should be considered as if fraud had been committed by a third person within the knowledge of the attorney. But upon appeal the chancellor refused to assent to this position, and held that, as the attorney was the contriver of the fraud, he would certainly conceal it from his principal, and that, therefore, the law would not impute notice to the latter. See, also, Espin v. Pemberton, 3 De G. & J. 555, per Lord Ch. Chelmsford. In Atterbury v. Willis, 8 D. M. & G. 454, the rule in Kennedy v. Green was in turn limited; it must appear that distinct fraud was intended in the very transaction, so as to make it necessary for the agent to conceal the facts from his principal in order to defraud him.

In America the rule generally prevailing is that the knowledge must come to the agent during the employment. "It is a mistake to suppose that it depends upon the reason that no man can be supposed always to carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of man is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one; that it is only during the agency that the agent represents and stands in the shoes of the principal. Notice to him then, is notice to the principal. Notice to him twenty-four hours before the relation commenced, is no more notice than twenty-four hours after it has ceased would be."—Per Sharswood, J., Houseman v. Building Ass'n., 33 Leg. Int. 108; N. Y. Cont. Ins. Co. v. Ins. Co., 20 Barb. 468; Keenan v. Mo. Ins. Co., 12 Iowa, 126; Farmers', etc. Bank v. Payne, 25 Conn. 444; Willis v. Vallette, 4 Met. (Ky.) 186; Bierce v. Red Bluff Hotel, 31 Cal. 160: Congar v. R. R., 24 Wis. 158. It does not follow from what we have said, that notice, to affect the principal, must be given to the agent in the particular transaction to

which the notice relates. The better opinion, says Mr. Wharton (Agency, § 178), is, "that wherever the agent, acting in the scope of his duties for his principal, receives notice in a matter in which he represents the principal, such notice is notice to the principal, although the notice is not received in the identical transaction to which the notice relates. The extent to which the principal is affected by the knowledge of his agent, is not limited by the agent's authority to act upon the knowledge. Thus in Peoria Marine and Fire Ins. Co. v. Hall, Sup. Ct. Mich. (3 Am. Law Reg. N. S., 417), the holder of a fire policy kept gunpowder in his store, which, under the provisions of the policy, would render it void; the agent who effected the insurance knew at the time that gunpowder was being sold on the premises, and verbally assented that the insured should continue to hold and sell it; it was contended by the company that the agent had no authority to give such assent. But the court, per Christiancy, J., held: "This, at first view, would seem plausible and might be sound, but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to the principal."

G. D. B.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE OF TRESPASSER—IMPUTED NEGLIGENCE.

CAULEY v. PITTSBURGH, ETC. R. CO.

Supreme Court of Pennsylvania, November, 1880.

To suffer a child to wander on the street has the sense of a permit. If such permission or sufferance exist, it is negligence. Children can not be upon a railroad without culpable violation of duty by their parents or guardians.

Error to the Court of Common Pleas, No. 2, of Allegheny County.

Plaintiff's counsel offers to prove by the witness on the stand, Bridget Cauley, that on the morning of the 20th day of September, 1879, she came out of her house on the hill-side opposite the point bridge, and above the defendant's railroad and switches; that she saw the defendant's freight cars being shifted down the road and in motion; that she saw and heard the conductor of the train, standing on the track, and close to the nearest switch in that vicinity, and close to the moving train, calling to and ordering a number of boys that were on the car, to wit, a sand car loaded with sand for the glass-house, and ordering them to get out of the car, in a very authoritative tone of voice; that discovering at the time that this small boy, John H. Cauley, was among the boys on the car, she spoke out and protested against the boys having to get off the car, at least her boy, while the cars were in motion; that she remonstrated with the conductor, and asked that they should not be put off until the cars should be stopped; that the conductor persisted in ordering the boys to get off while the cars were in motion; that while the conductor was giving such orders to get off, the larger boys jumped off the car on different sides of the track that they were running on, and that her little boy, John Henry Cauley, then seven years two months and six days old, jumped off also, and fell under a wheel of the car, and his leg was bruised so that it had to be amputated. Plaintiff's counsel further offers to prove by the witness that after the cars had started, and while in motion, and when the conductor was giving said orders, that a man, a brakeman on the cars, came towards the boys in a manner which indicated that he was about to enforce the orders of the conductor, and this immediately before the boys jumped off the car.

This, for the purpose of showing, that those in charge of the train of defendant, had acted carelessly and negligently in the premises, and had ordered the boys to get off the train at an improper time, when it was in motion; and also to show negligence on part of defendant. 1. Defendant's counsel object to the offer as incompetent and irrelevant generally. 2. Because the offer discloses the fact that the plaintiff, the boy injured, was a trespasser at the time of his injury, being in a place where he had no right to be, and it fails to disclose any act of negligence upon the part of any employee of the company, for which the company is itself liable. Objection sustained, testimony excluded, and bill sealed for the plaintiff. The same offer was made in a different shape and refused by the court, and exceptions taken. The plaintiff then rested, and the court directed a verdict for the defendant. The rejection of these offers was assigned for error.

PAXSON, J., delivered the opinion of the court:

It was said by Mr. Justice Strong, in Philadelphia, etc. R. Co. v. Hummell, 8 Wright, 378: "It is time it should be understood in this State that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere, except where a way crosses it." The same doctrine has been reiterated again and again in subsequent cases. In Mulherin v. Delaware, etc. R. Co., 31 P. F. S. 366, it was said: "Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company has not only a right of way, but it is exclusive at all times and for all purposes;" and Railroad v. Norton, 12 Harris, 465, was cited in support of this rule. Many other cases might be referred to, were it necessary. We live in an age of steam and rapid development. The world demands quick transportation. Increased speed necessarily involves increased danger. Holding, as we do, such corporations to a strict responsibility for negligence, it is our duty to give them a clear track. This rule is not only proper in itself, but is necessary for the preservation of life. Its propriety is no longer a subject for discussion.

It ought also to be equally well understood that parents who permit their children to trespass upon the track of a railroad are guilty of negligence. It is not only gross but culpable negligence, as it imperils the lives of the children so trespassing, as also the lives of the traveling public. A similar view was taken in Railroad Company v. Hummell, *supra*, where it was said that children "can not be upon the railroad without a culpable violation of duty by their parents or guardians." It is very clear, therefore, that as to the suit brought by John Cauley in his own right for the injury to his son he can not recover. The child was upon the car, where he ought not to have been, by the negligence and want of care of his father. Nor does the offer of evidence, ruled out by the court below, tend to rebut the presumption of negligence on the part of his parents. On the contrary it strengthens it. Assuming the offer to be true, it shows that the child was not only playing upon the car on the occasion when he received the injury, but that he had done so before. The location was near his parents' house, probably in sight, as his mother saw the accident and called to the conductor. That the child was there without his father's consent is not to the purpose. "To suffer a child to wander upon the street has the sense of permit. If such permission or sufferance exist, it is negligence." Philadelphia, etc. R. Co. v. Long, 25 P. F. S. 265. I apprehend few parents would consent to a child playing upon a railroad track, or any other known place of danger. But many parents might neglect the precautions necessary to prevent it. In some instances it would require more than merely to caution a child against it. Positive prohibition, followed by punishment for violation, may sometimes be necessary. It too often happens that boys are allowed to wander about the streets, and trespass upon railroad tracks with very little care or supervision of their parents. Whilst so engaged injuries of this character are likely to happen. Much as they are to be deplored, and however much our sympathies may be aroused for one so injured, it would be unjust to compel a corporation or individual to make a pecuniary compensation for such accident, where it was the result of the lawful pursuit of a lawful business by such corporation or individual. Aside from this, the defendant company owed the father of this child no duty. The father owed his child the duty of protection. The company did not. The evidence was properly rejected.

In regard to the suit brought for the child by his father, as his next friend, it is sufficient to say, that the child being unlawfully upon the car, the defendant company owed it no duty, and is not liable for the injury. This was the principle upon which Railroad Co. v. Hummell, was ruled. In the recent case of Duff v. Allegheny R. Co., 27 Pittsburgh Legal Journal, 58, it appeared that a conductor of a train, in violation of the rules of the company, permitted a boy to sell papers on the train. By the alleged negligence of the company the boy was killed. The right of his mother to recover was denied, upon the ground that the boy was a mere trespasser, and the company owed him no duty. It is useless to multiply authorities. The rule is well settled and is sustained by reason and authority. Moreover, it is demanded by humanity. There are many unfeeling parents, who not only neglect, but maltreat their children. It would be cruel to such children to lay down a rule which would make it an object for unprincipled parents to expose them to injury and death upon a railroad track.

Upon the merits these judgments ought to be affirmed. But we notice that one writ of error has been taken to the two cases. There is no authority for this. It is a practice that we will not encourage. Besides, the Commonwealth loses the tax upon one writ. There should have been a separate writ of error to bring up each case. We have expressed our opinion upon the merits to avoid having our time occupied with the cases again. But we will not enter judgment.

Writ quashed.

We concur in quashing the writ, but not in the opinion, to which we dissent:—TRUNKEY and STERRETT, JJ.

PERMITTED ASSAULT — CONSENT — DURESS.

LATTER v. BRADDELL.

English Court of Appeal, February 24, 1881.

The mistress of a female servant, believing her to be *enceinte*, sent for a doctor to examine her. Upon the doctor's arrival, the servant remonstrated, but ultimately, upon being told that she must do so, submitted reluctantly to the examination. The servant subsequently brought an action of assault against her master and mistress and the doctor. *Held*, that there was no evidence to show that what was done was against the plaintiff's will, and that, in the absence of any evidence of force, violence, or coercion, neither the mistress nor the doctor was liable; that the case as against the former was rightly withdrawn from the jury, and that the verdict found for the latter was correct.

Appeal by the plaintiff from a refusal of the Common Pleas Division to make absolute a rule *nisi* for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence. On the motion to make the rule absolute, the Divisional Court (LOPES and LINDLEY, JJ.) were divided in opinion, and consequently the rule dropped. The plaintiff appealed.

The facts as stated by LOPES, J., in his opinion below, were as follows: The plaintiff was a housemaid in the service of Mr. and Mrs. Braddell. Mr. and Mrs. Braddell had been absent from home, and returned on the 23d of December. From some information given by a charwoman, Mrs. Braddell came to the conclusion that the plaintiff

was in the family way. On the 27th of December Mrs. Braddell told the plaintiff to pack up and leave before twelve o'clock, as she was in the family way. This the plaintiff denied. Mrs. Braddell replied the doctor would be there directly (the doctor had been previously sent for unknown to the plaintiff). Mrs. Braddell told the plaintiff to go to her bedroom. The plaintiff cried. Mrs. Braddell forbade her to speak. The plaintiff went to her bedroom. The doctor came and went to the plaintiff's bedroom. The plaintiff cried and said she never had such treatment before; she asked the doctor what he was going to do, and said she did not like to be examined. The doctor said he was a professional man, and told the plaintiff to take off her dress. The plaintiff said she did not like to do so. The doctor said never mind, it would satisfy Mrs. Braddeil and him. The doctor told the plaintiff to take off her petticoat. The plaintiff cried, and said she did not like to take off her other things. The doctor said she must. The plaintiff took off her stays. The doctor said she must take off her chemise. The plaintiff said she did not like to do so. The doctor said she must, and told her to slip her arms through. The doctor then told her to lie on her back on her bed, and to loosen the strings of her drawers. He then pinched her breasts and stomach and sounded it. The plaintiff cried all the time. The doctor, after examining her, said she was all right, and he must speak seriously to Mrs. Braddell about it. The plaintiff then dressed. During the examination the plaintiff and the doctor were alone; there was no female in the room. Mrs. Braddell refused to give her a character. The plaintiff, in answer to a question put by her learned counsel, swore that what was done was not with her consent.

Murphy, Q. C., and *Morten*, for the plaintiff; *Addison*, Q. C., and *French*, for the defendants, were not called upon.

BRAMWELL, L. J.—I think my brother Lindley was right in this case. I think his direction was right, and that the jury found a right verdict. I daresay the woman thought that her master and mistress had a right to have her examined. But what she did was to submit under the influence of other considerations. The truth is that it is impossible to say the jury was wrong in finding that she submitted, not in consideration of violence, but for some other reason. It is not like the case put by Mr. Murphy of a boy holding out his hand to be struck, for the boy knows that if he does not submit he will be compelled to submit to something worse. There is no ground here to suppose that to be the case, and I am satisfied that she did not submit under any fear of violence.

I doubt whether Mr. Justice Lindley might not have withdrawn the case altogether from the jury. If the verdict for the doctor was right, the others were entitled to a verdict also. The jury would have been wrong if they had found against all three defendants. I think Mr. Justice Lindley was right, because the master and mistress could only be liable if force had been used, or reasonable apprehension of violence excited in the woman's mind by them, or if that had been done by their order. But there was no evidence of that. Even if the verdict had been against the doctor, it ought to have been in favor of the others. The doctor, however, seems to have behaved most kindly. If the master and mistress thought they had a right to have the girl examined, they were very much mistaken.

BAGGALLAY, L.J.—I am of the same opinion. The argument was supported on the ground that there was misdirection in withdrawing the case from the jury, and that with regard to the doctor, the verdict was against the weight of evidence. I think the verdict was right. It appears to me that the girl voluntarily led the way upstairs. She went into the room and, following out her statement, her objection was not so much to be examined as to strip off her clothes one by one. The doctor was in the performance of his ordinary duty. She might have resisted if she had pleased, but she did not resist. There can be no doubt that if there was no verdict against the doctor, there could be none against Mr. and Mrs. Braddell. The doctor did nothing more than was necessary to ascertain whether the girl was in the family way.

BRETT, L.J.—I think the learned judge did nothing wrong this case. It seems to me the doctor could only be liable if he acted without the consent or submission of the plaintiff, and that the other defendants could only be liable if the doctor so acted, being authorized by them to act without such consent or submission. It seems to me there was no evidence to be left to the jury that they authorized him to do it without the consent of the girl. I am of opinion, therefore, that the judge was right in saying there was no case to go to the jury against Mr. and Mrs. Braddell.

There might be a case against the doctor without there being a case against Mr. and Mrs. Braddell. If he had examined the girl without her consent, but without having been authorized by them to do it without her consent, he would be liable and not they. I think there was no case to go to the jury against the doctor. I think he did not act in any way so as to make the girl think force would be used to her. If she had so supposed, but without any such reason as would make a reasonable person think so, he would not be liable. It must be shown that he did use actual force, or that she acted under conduct of his which would make her think he was going to use violence.

The law laid down in the judgment of Mr. Justice Lindley was the true law. If there was no threat and she submitted, there was no assault. There was no misdirection. The jury were right in finding the verdict, and the judgment must stand.

I think persons have no right to make such an examination; it was absolutely wrong.

Appeal dismissed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

RAILROAD CHARTER — ALTERATION AND AMENDMENT BY LEGISLATURE — CONTRACT BY RAILROAD COMMISSIONERS.—The New Haven and Northampton Company is a Connecticut corporation, authorized to construct and operate a railroad from New Haven, through the town of Southington, to the Massachusetts State line. It has full power to erect and maintain toll-houses and other buildings for the accommodation of its concerns, as it may deem suitable for its interest, but its charter may "be altered, amended or repealed at the pleasure of the General Assembly." In 1848, after the road was built, three stations were established in the town of Southington, named respectively Southington, Plantsville and Hitchcock's, at which trains stopped for freight and passengers. In 1866, the legislature passed a law forbidding the abandonment and removal of established railway stations, except with the approval of the railway commissioners, given after a public hearing. In 1873 the company, desirous of abandoning its stations at Southington and Plantsville, obtained the assent of the commissioners with the appropriate formalities, and abandoned them. The legislature of 1875 passed an act "establishing a depot at Plantsville," providing that, if the petitioners and others who should erect a depot at that place, and convey it and the land on which it was situated to the company, it should become the duty of the company to stop its trains at that place for the purpose of receiving and discharging freight and passengers, and ordering the company so to do. The act further provided that the order should be enforceable by *mandamus*. The petitioners named complied with the provisions of the act, and having tendered the company a conveyance of suitable depot grounds and buildings at Plantsville, demanded that the regular passenger and freight trains running on the road be stopped there. This the company refused to do, and the attorney for the State for the County of Hartford now seeks by *mandamus* to enforce the law. The court below gave judgment against the company, holding, among other things, that the act of 1875 did not impair the obligation of any contract rights which the company had acquired from the State. Upon the argument of the writ of error, it was conceded that nothing in the charter prevented the passage of the law of 1875, but it was urged that, the action of the commissioners operated as a contract on the part of the State not to exercise its legislative power to require the establishment of a depot at Plantsville. The court said: "As it seems to us, the Court of Errors of the State took the right view of the statute under which the commissioners acted, when they said, in State v. N. H. & N. Co., 37 Conn. 163, its object was 'to prevent railroad companies from arbitrarily changing their places of business on the road, to the prejudice of those who, relying on the permanency of such places, shape their business accordingly.' The powers of the commissioners, as agents of the State, in this particular, are confined to such as are necessary for the accomplishment of that object. They may, after a public hearing, approve of, that is to say, give the assent of the State to the abandonment of a station which has been established twelve months or more, and that is all they can do. They may, as was held by the Court of Errors in State v. N. H. & N. Co., 42 Conn. 59, direct that their approval take effect only when the company shall have provided suitable accommodations for the public at some other place, but that is only a conditional approval of the abandonment. When the new accommodations have been provided, and the old station abandoned, nothing more has been accomplished, so far as the company is concerned, than a lawful abandonment of an old place of business. The powers of the State over the charter remain just as they were before. Until the act of 1866 the company could abandon its stations at will, and the State by charter amendment, or even by a general law, might require their restoration. After that act the power of abandonment by the company was restricted, but the State retained all its old authority. The commissioners were given no power to contract for the State or the public. All they could do was to say yes, or no, to a simple request by the company for leave to abandon an old station. If they said yes, the abandonment might be made; if no, the station must be continued. In this case the commissioner said 'yes, when the new accommodations are furnished.' The new accommodations were furnished and the station was abandoned accordingly. Such was the view taken of what was done by the Court of Errors in the case last cited (42 Conn. 59), and we think it is correct. The commissioners entered into no agreement with the company. They simply said: Complete your proposed accommodations at the new station and we will assent for the State to your abandonment of the old one. It follows that the new law impaired no contract obligation of the State, and the judgment of the Court of Errors is consequently affirmed." In error to the Supreme Court of Errors of the State of Connecticut. Opinion by Mr. Chief Justice WAITE.—*New Haven, etc. R. Co. v. Hamersly.*

TAXATION — ASSESSMENT BY THE STATE OF CAPITAL EMPLOYED IN EXPORTS.—The plaintiff in error, being a resident of the City of New York, was assessed for taxation as of January 1st, 1876, upon his personal estate, exclusive of bank stock, to the amount of $60,000. The law of the State provides, that, "All lands and all personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation." 1 Rev. Stat. N. Y. ch. 13, t. 1, sec. 1. The statute also declares that "the terms 'personal estate' and 'per-

sonal property,' whenever they occur in this chapter, shall be construed to include all household furniture, moneys, goods, chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, public stocks, and stocks in moneyed corporations. They shall also be construed to include such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate." 1 Rev. Stat. N. Y. ch. 13, t. 1, sec. 3. Haneman made application, supported by affidavit, for the reduction or remission of the assessment on the ground that, on January 1, 1876, and during the period covered by the assessment, all his personal estate, except $5,500, being nearly $120,000, "was continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the customs department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different States of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports," and that the only portion of his estate upon which he is liable to be assessed and taxed, is the sum of $5,500. It appeared from his examination before the tax commissioners, that "his said capital is invested uniformly and continuously in cotton, the product of, and having a *situs* in, various States outside of New York, and in transit to the port of New York, and other Atlantic ports, for the sole purpose of exportation, and no portion of such cotton is intended to be, or is, sold in New York, or any other United States market; that deponent purchases cotton largely upon credit, and that of his capital as much as $115,000 is continuously invested in cotton of the growth of the United States, which has been cleared at a custom-house, and is on shipboard in course of exportation to some foreign State or country." The reduction and remission were both denied. Upon writ of *certiorari* the proceedings of the tax commissioners were affirmed in the Supreme Court of the State, and its judgment was affirmed by the Court of Appeals. Upon its being urged that such tax and assessment were unconstitutional, because products of the United States, which have passed the customs department and are on shipboard in the course of exportation, have become exports, and are no longer within the taxing power of the State; and because a tax on capital invested in products of the United States, in transit from one State to another for purposes of exportation, or on money used and employed in exporting such products, is an unauthorized interference by the State with the regulation of commerce, the court said: "Although these propositions are deemed by counsel to be very easy of solution, we do not feel obliged to determine them in this case. The plaintiff in error was assessed upon his personal property, as of January 1st, 1876. If the capital, which he claims was uniformly and continuously employed in the business of purchasing cotton for exportation from the United States to foreign countries, through the custom department, was, in fact, in money on the first day of January, 1876, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries. Neither in his affidavit, nor in his examination before the tax commissioners, does he distinctly claim (and, perhaps, could not), that the capital which he thus employed in the business of purchasing cotton for exportation was, in fact, so invested on the first day of January, 1876. His capital may have been, in a business or mercantile sense, continuously so employed, and yet it may not have been, in fact, so invested at the date to which the assessment, whenever made, relates. We have no occasion, therefore, in the present case, to consider or determine the questions of constitutional law discussed by counsel. It will be time enough to consider them when they come before us in such form as to require their determination." Affirmed. In error to the Supreme Court of the State of New York. Opinion by Mr. Justice HARLAN.—*People, ex rel. v. Commissioners.*

BANKRUPTCY — FRAUD.— Eldredge was sued with Henry and Betsey Moyer to subject to the debts of complainants certain real estate, which he was charged with having conveyed to the Moyers to defraud his creditors. In the court below the case was sent to a referee, who found that the transaction was fraudulent, and that although Eldredge had become a bankrupt and been thereby released from his debts, he had afterwards confessed judgment on the complainants' debts. *Held*, that the discharge in bankruptcy is personal to Eldredge, and does not release the other defendants from liability for fraud committed by them, but that the right to bring such an action as this to subject property fraudulently conveyed, is vested in the assignee alone, and if it appeared by the record that an assignee in bankruptcy had been appointed, complainants could not recover in this action. But as it does not appear that the existence of an assignee or his right to sue for the property is raised by this record, the judgment of the court below in favor of complainants is affirmed. Affirmed. In error to the Court of Appeals of the State of New York. Opinion by Mr. Justice MILLER.—*Moyer v. Dewey.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January, 1881.

CRIMINAL LAW — INSOLVENCY — NOTICE OF FILING PETITION.—At the trial of an indictment under Gen. Sts., c. 118, § 106, which provides that "If a debtor, after notice of the filing of a petition by or against him, secretes," etc., he shall be punishable "by imprisonment in the State prison, not

exceeding five years," etc., the presiding judge instructed the jury. "that actual knowledge by the defendant of the filing of the petition is, the other elements of the case being proved, all that is required." By § 104 of the same chapter, it is provided "that the judge, after notice of the petition given to the debtor by a copy thereof served upon him personally, or left at his last and usual place of abode, and a hearing." etc., "shall forthwith issue his warrant to take possession of the estate of the debtor." *Held*, that the instruction was erroneous. The notice which the debtor must have is a notice from the judge to him, and until such notice is given, no liability under this clause of the statute could attach. Opinion by LORD, J. —*Commonwealth v. Martin.*

HUSBAND AND WIFE — RIGHT TO REMOVE BODY—EQUITY.—The plaintiff, in a bill in equity, alleged in substance, that two days after the death of his wife, he consented to her burial, in a coffin and grave-clothes procured by himself—in a lot in the cemetery of the defendant corporation, owned by the husbands of two sisters of his wife; that he consented to such burial while in great distress of mind, and worn out by taking care of his wife during her last illness, and yielding to continued importunities of the sisters and of the husband of one of them, much against his own wishes and feelings, "fearing that they would make trouble for him if he did not consent," and "which he should not have done, had his mind been in condition to realize the situation;" that he has no right or authority to take care of or adorn her grave in that lot, or to bury other of his or her family or friends there, or to be buried himself by her side; that he owns jointly with his co-heirs a lot in the Mount Hope Cemetery, in which his father and mother are buried, and in which he wishes that his late wife, and himself at his death, may be laid; that he desires to remove to this lot her remains, with the coffin containing them, and the stones and monuments placed by him at her grave; and has obtained a permit in due form from the proper board of health for that purpose; that he has requested of the defendants permission to do so in a careful and proper manner, doing no damage to the lot in which she is now deposited, and leaving that lot in good condition; and that they have refused such permission. *Held*, that upon these allegations, if supported by evidence, it was within the authority of the justice before whom the hearing was had, to decide that the plaintiff never freely consented to the burial of his wife in the lot of the defendants' cemetery, with the intention and understanding that it should be her final resting place; and that a court of chancery, in the exercise of its undoubted jurisdiction, might order the defendants to permit him to remove her body, coffin and tombstones to his own lot in which his parents are buried. Opinion by GRAY, C. J.—*Weld v. Walker.*

DEED — CONDITION — VALIDITY — CONSTRUCTION.—A conveyance of certain lots of real estate was made, subject to certain restrictions and conditions, viz.: "That the said grantees, their heirs or assigns, shall never erect any building or part thereof, which shall be used * * * * for any nauseous or offensive trade whatsoever; nor occupy such lots for these or any other purposes which shall tend to disturb the quiet or comfort of the neighborhood; and that no building or part of any, and no fence over six feet high, shall be erected within eight feet of the streets upon which said lots bounded;" but the erection or use of any such building, or the occupation of the land hereby conveyed, contrary to these provisions or any of them, shall not subject the said grantees, or their heirs or assigns, to a forfeiture of their estate in said land. *Held*, that the conditions were valid and enforceable in equity at the suit of any party entitled to the benefit of them; that the restriction against building "within eight feet of said streets," had reference to the line of each street as existing at the date of the deed, and was intended to establish a uniform rule as of that date, which could not be affected by the subsequent widening or narrowing of either street by public authority, or by the fact whether a building was erected before or after such alteration of the line; and that the sale of groceries and provisions could not be considered as coming within the restriction against nauseous or offensive trades or purposes tending to disturb the quiet or comfort of the neighborhood. Opinion by GRAY, C. J.—*Tobey v. Moore.*

SUPREME COURT OF MISSOURI.

February 1881.

EQUITY — SHERIFF'S DEED — EVIDENCE — FRAUD.—A sheriff's deed is by law *prima fac* evidence of the recitals it contains, and together with the execution and return thereon, is admissible in evidence; and the return on the execution is presumptively true, even against strangers. The bidder at execution sale may transfer his purchase to another, and such other become the recipient of the deed from the sheriff. If the clerk of the sheriff buy at the sale of his employer, although it is not prohibited by statute, equity will view such transactions as against the policy of the law, as pregnant with suspicion of fraud, and if there be indications of unfairness, or inadequacy in price, or the like, will hold that the purchase is not *bona fide*. If the purchaser do not pay the money until after he receive notice of facts calculated to put a reasonably prudent man upon inquiry, the payment will come too late to afford him protection. Reversed and remanded. Opinion by SHERWOOD, C. J.—*Massey v. Young.*

EJECTMENT — EVIDENCE — DEED — EFFICACY OF, AS CONVEYANCE.—This was an action in ejectment. Plaintiff showed title in the wife of H, she having inherited from her father, and she and her husband signing a deed to plaintiff, in

1874, which deed was not acknowledged by either of them. Said deed was not objected to in evidence. The court declared the law to be that this deed vested the title to the premises in plaintiff. This instruction was objected to at the time, but was not brought to the notice of the court in the motion for a new trial. *Held*, that the failure of defendant to object to the introduction of the deed in evidence, while it would dispense with proof of its execution, would not impart to it any efficacy as a conveyance which it did not otherwise have. Being admitted in evidence without objection, its legal effect was yet to be determined, the same as though objection had been made. Real estate of the wife can only be conveyed by the joint deed of husband and wife, acknowledged and certified as provided by statute, 1 Wag. Stats. 273, § 2. The deed in evidence did not pass title to plaintiff. Reversed and remanded. Opinion by HOUGH, J.—*Bartlett v. O'Donoghue.*

BILL FOR REVIEW—PARTITION SUIT—FINAL JUDGMENT.—A petition to review and set aside a judgment in a partition suit. The lower court dismissed the petition, holding that the judgment for partition and sale, rendered at the September term, 1872, was the final judgment in said cause, and that the petition for review should, therefore, have been filed within three years from that date. *Held*, that the judgment of September, 1872, was not the final judgment in said cause, but that the sheriff having, at the September term, 1875, made his final report of the collection of the balance of the purchase-money of the lands sold (the cause having been continued to await said collection), and at said term, the report having been approved and final judgment therein rendered as required by law in such cases, the bill for review was filed in time.—Reversed and remanded. Opinion by HOUGH, J.—*Murray v. Yates.*

NEGLIGENCE—DAMAGES FOR BURNING HAY—INTEREST.—Action for damages for destruction of a large quantity of hay by fire which, it was alleged, escaped from one of defendant's locomotives through the negligence of servants of defendants in charge of the same. The jury were instructed that if they should find for the plaintiff, they should assess his damage at the value of the hay at the time it was destroyed, with interest thereon at six per cent. from that time to the present. *Held*, erroneous, interest not being allowable in cases of this character. Kenney v. R. Co., 63 Mo. 99. Reversed and remanded. Opinion by HOUGH, J.—*DeStiger v. Hannibal, etc. R. Co.*

SUPREME COURT OF INDIANA.

February, 1881.

REHEARING—EVIDENCE—PLEADING—1. Written evidence made over the signature of the parties, and purporting to be made in the usual course of business, should not be allowed to fall easily before verbal statements resting on recollection merely; and where, as in this case, the trial court seems to have given more credence to the documentary than to the oral proofs, this court has neither the right nor the inclination to disturb the finding. 2. The second paragraph of answer, under which alone the question made upon the evidence arises, is bad, for the reason that it purports to answer the whole complaint, while it responds to only one part of it. Petition for rehearing overruled. Opinion by WOODS, J.—*Jordan v. D'Hewe.*

FRAUDULENT CONVEYANCE—PLEADING.—In an action to set aside a conveyance of real estate as fraudulent against creditors, it must be alleged in the complaint, and proved on the trial, that at the time the conveyance was executed, the debtor did not have enough other property subject to execution to pay all his debts. Spaulding v. Myers, 64 Ind. 264; Price v. Sanders, 60 Ind. 310; Romine v. Romine, 59 Ind. 346; Evans v. Hamilton, 56 Ind. 34. Reversed. Opinion by HOWK, J.—*Noble v. Hines.*

BILL OF EXCEPTIONS—NUNC PRO TUNC ENTRY.—The appellant filed a motion to correct a bill of exceptions, by having the words, "and this was all the evidence given in the cause," inserted therein, alleging that the words were omitted by accident, and that the bill did, in fact, contain all the evidence. *Held*, that the court had no power, after the close of the term, to make the amendment. A court may record a fact *nunc pro tunc*; that is, if the fact existed then, it may record it now; but it can not record a fact now which did not exist then, and there must be some record, note, entry or minute of some kind on which to base it, connecting it with the case. Makepeace v. Lukens, 27 Ind. 435; Kirby v. Bowland, 69 Ind. 290. The evidence not being carried into the record, no question is presented for the consideration of this court. Affirmed. Opinion by ELLIOTT, J.—*Seig v. Long.*

MORTGAGE—INSUFFICIENT DESCRIPTION—PLEADING—DEMURRER.—Action upon a promissory note and to foreclose a mortgage securing it. It is contended that the complaint is bad, because it does not show that the land mortgaged is situated in Delaware County. But the copy of the mortgage, made an exhibit to the complaint, recites that the real estate is situated in Delaware County and this aids and controls the averments of the complaint. Even if the mortgage was void for uncertainty, the complaint properly counts upon a promissory note, and although not warranting a decree of foreclosure, it could not be overthrown by demurrer. The defect in the mortgage might be reached by motion to strike out, by objection to the introduction of the mortgage in evidence, by objection to the part of the judgment decreeing foreclosure, or by motion to modify by striking out such part of the judgment. Affirmed. Opinion by ELLIOTT, J.—*Bayless v. Glenn.*

SHERIFF'S SALE—PRESUMPTION OF REGULARITY.—Suit to recover possession of land. The court made a special finding of the facts. The land had been sold at sheriff's sale on a judgment with relief from valuation and appraisement laws, and the court found that it had been sold without appraisement. *Held*, that the finding, in this particular, was not sustained by any evidence. The return of the sheriff to the execution upon which the sale was made, did not state whether or not the land was appraised, and nothing was disclosed on that subject by any of the other evidence at the trial. The regularity of the proceedings of the sheriff should have been presumed until the contrary was shown. It devolved upon the party attacking the sale to show that there had been no appraisement. Rorer Jud. Sales, 843-857; Evans v. Ashby, 22 Ind. 15. Reversed. Opinion by NIBLACK, C. J.—*Talbott v. Hale.*

ATTORNEY AND CLIENT—AGREEMENTS NOT BINDING ON LATTER.—In this case the appellee recovered a judgment against an estate of which appellant was administrator, and sixty days were given the appellant in which to file his bill of exceptions for appeal. The attorneys of the appellee agreed with the attorneys of appellant that the bill might be filed after the sixty days had expired. After the expiration of the sixty days, and before the bill was in fact filed, appellee dismissed her attorneys and gave them notice that she did not wish to have said bill of exceptions filed. The same was, however, put into the record, and the question is whether it became a part of such record in the case. The powers of attorneys are defined by statute: "An attorney has authority, until discharged or superseded by another, to bind his client in an action or special proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise. Code, sec. 772. *Held*, that the verbal agreement by the attorneys to extend the time beyond the sixty days, was unauthorized and did not bind the client; nor did their written agreement to that effect, after they were discharged and superseded by other attorneys. Nor was the client estopped by their action. Affirmed. Opinion by WOODS, J.—*Goben v. Goldsberry.*

QUERIES AND ANSWERS.

QUERIES.

14. A devised a tract of land to B, and in the will, prohibited a sale of it by the latter, on account of his indiscretion, though twenty-one years of age, until 1884. The restriction being thus upon the power of voluntary alienation, can the land be sold for B's debts by a sheriff under a common-law execution, or it require the intervention of the chancellor?

Sandford, Ky., March 1, 1881. Z.

15. A recovers in ejectment from B, the tenant of C, the unlawful entry of B being laid on January 1, 1880. C has entered January 1, 1878. Can A, under the decisions of the Missouri Supreme Court, maintain an action against C for the mesne rents and profits for the years 1878 and 1879? P.

16. Is the payee and holder of a promissory note liable to the maker in damages for wrongfully protesting the same? In other words, A, who is solvent, gives a note to B, due in ninety days, for $100, without surety or indorsers. When the note comes due, B, the note being payable at his office, has it protested. Is he liable in damages, punitive or otherwise, for the injury? A. B.

QUERIES ANSWERED.

Que. 8. [12 Cent. L. J. 143.] Can the indorser of a negotiable note before due, impeach the validity of the note he has indorsed, in an action between his indorsee and the maker, in Missouri? Please give authority. SUBSCRIBER.

Columbia Law School, Jan. 21, 1881.

Ans. We suppose this question to be whether an indorser of a negotiable security, indorsed before it was due, is admissible as a witness to impeach its original validity. This is a question upon which the courts have been much divided in opinion. The negative is held by the early English decisions, by the United States Supreme Court and by the courts of the following States: Massachusetts, Maine, Pennsylvania, Ohio, Iowa, Illinois, Mississippi, Tennessee and Louisiana; while the affirmative is maintained by the recent English decisions and by the Supreme Courts of the States of New York, New Jersey, Maryland, Virginia, Vermont, Connecticut, New Hampshire, North Carolina, South Carolina, Alabama, Texas and Missouri. Let "Subscriber" examine Bank v. Hull, 7 Mo. 273; St. John v. McConnell, 19 Mo. 38. M.

Battle Creek, Mich.

Que. 13. [12 Cent. L. J. 239.] In a sheriff's deed on the foreclosure of a mortgage by advertisement, the sheriff signs his name, but not officially. Does the want of the official character to the signature render the deed void? In the body of the deed he is described by his proper name as sheriff. In the proof of acknowledgment, the acknowledging officer certifies that he is personally known to be the person described in, and who executed the deed, and to be the sheriff, etc. And in the proof of sale he swears that he is and was at the date of sale, the sheriff, etc., in fact, the deed appears in every way sufficient except that the official character of the sheriff does not appear to his signature to the deed. How does this affect the validity of the deed, if at all? X.

Ans. It is not necessary that a public officer who signs his name to a paper in that capacity, should add the name of his office, unless a statute expressly so requires. His official character must exist, but he need not add it. Every person is presumed to know who fills the public offices. Van Ness v. Bank of United States, 13 Pet. 17; Sheldon v. Van Buskirk, 2 N. Y. 473; Russ v. Wingate, 30 Miss. 440. Possibly there must, in the absence of a statement of official character, be evidence thereof *aliunde* (Connelly v. Bowie, 6 Har. & J. 141; Elliott v. Cronk, 13 Wend. 35; Rhoads v. Selin, 4 Wash. 718, and cases *supra*), which is admissible. In the case put, the official character appearing in the body of the paper is *prima facie* proof of that character. D. L. A.

Sherburne, N. Y.